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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 72

HENRY J. BEAL, COUNTY ATTORNEY OF DOUGLAS COUNTY, NEBRASKA, ET AL., PETITIONERS,

vs.

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 9, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

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INDEX.

	Original	Print
Proceedings in U. S. C. C. A., Eighth Circuit	a	1
Caption (omitted in printing)	a	
Record from D. C. U. S., District of Nebraska	1	1
Caption (omitted in printing)	1	
Petition	1	1
Order of Nebraska State Railway Commission in the case of J. F. Moredick vs. Missouri Pacific Railroad Corporation	5	5
Statement of facts	5	5
Opinion	6	6
Order that defendant comply with Section 74-519, Compiled Statutes of Nebraska, 1929	7	6
Motion of defendants to dismiss	15	14
Opinion on overruling of motion to dismiss	16	15
Order overruling motion to dismiss	19	18
Answer	20	19
Decree	28	27
Notice of appeal	30	28

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	Original	Print
Record from D. C. U. S., District of Nebraska—Continued		
Bond on appeal ..... (omitted in printing) ..	30	
Statement of points to be relied upon	33	29
Designation of contents of record on appeal	35	30
Clerk's certificate to transcript	36	31
Recital of mailing of copy of notice of appeal to counsel for plaintiff	36	31
Proceedings in U. S. C. C. A., Eighth Circuit	37	31
Appearances of counsel ..... (omitted in printing) ..	37	
Order of submission	38	31
Opinion, Gardner, J.	39	32
Decree	48	40
Petition of appellants for rehearing	49	40
Order denying petition for rehearing	59	47
Praecipe for transcript of record	59	47
Clerk's certificate	61	48
Order allowing certiorari	62	48

[fol. a] [Captions omitted.]

[fol. 1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF NEBRASKA, OMAHA DIVISION

No. 1226. Equity

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA, Plaintiff,

vs.

HENRY J. BEAL, County Attorney of Douglas County, Nebraska; M. L. Andres, State Sheriff of Nebraska; John J. Pszanowski, Chief of Police of the City of Omaha, Nebraska; Charles B. McDonald, Sheriff of Douglas County, Nebraska; Harry Mundell, Sheriff of Sarpy County; Ed W. Phingan, Sheriff of Cass County; Carl Ryder, Sheriff of Otoe County; J. C. Broady, Sheriff of Nemaha County; Lewis W. Davies, Sheriff of Richardson County, and C. A. Sorensen, Attorney General of Nebraska; Charles A. Randall, John J. Miller and Hugh Drake, Members of the Nebraska State Railway Commission of the State of Nebraska, Defendants.

PETITION—Filed October 26, 1932

To the Honorable Judge of the District Court of the United States for the District of Nebraska:

For cause of action against the Defendants, Plaintiff alleges—

[fol. 2] I

Plaintiff is a corporation, organized and existing under and by virtue of the laws of the State of Delaware and is now, and, at all times hereinafter referred to, was a resident and citizen of the State of Delaware.

Plaintiff's business is that of a Common Carrier of passengers and freight for hire, and Plaintiff is now, and, at all times hereinafter referred to, was engaged in the transportation of passengers and freight for hire in interstate commerce.

The Defendant, Henry J. Beal, is the duly elected, qualified and acting County Attorney of Douglas County, Nebraska; the Defendant, M. L. Endres, is the duly appointed, qualified and acting State Sheriff of Nebraska; the Defendant, John J. Pszanowski, is the duly appointed, qualified and acting Chief of Police of the City of Omaha, Nebraska; the Defendant, Charles B. McDonald is the duly elected, qualified and acting Sheriff of Douglas County, Nebraska; the Defendant, Harry Mundell, is the duly elected, qualified and acting Sheriff of Sarpy County, Nebraska, the Defendant, Ed. W. Phingan, is the duly elected, qualified and acting Sheriff of Cass County, Nebraska; the Defendant, Carl Ryder, is the duly elected, qualified and acting Sheriff of Otoe County, Nebraska; the Defendant, J. C. Broady, is the duly elected, qualified and acting Sheriff of Nemaha County, the Defendant, Lewis W. Davies, is the duly elected, qualified and acting Sheriff of Richardson County, Nebraska; the defendant, C. A. Sorensen, is the duly elected, qualified and acting Attorney General of Nebraska.

The afore named Defendants are the law enforcement officers for their respectively indicated jurisdictions.

The Defendants, Charles A. Randall, John H. Miller and Hugh Drake are the duly elected, qualified and acting members of the Nebraska State Railway Commission having jurisdiction in the State of Nebraska over the rates, service and general control of Common Carriers.

Each and all of the Defendants are residents and citizens of the State of Nebraska.

[fol. 3] II

This is a civil suit in equity, involving an amount of money, exclusive of interest and costs, exceeding the sum of $3,000.00.

This suit presents and constitutes a controversy wholly between the Plaintiff, a resident and citizen of the State of Delaware, on the one side, and the Defendants, all of whom are residents and citizens of the State of Nebraska, on the other side.

The cause of action herein stated arises under the Constitution of the United States, particularly Article I, Section 8 thereof, which vests in the Congress of the United States jurisdiction "to regulate commerce * * * among

the several states * * *." and Section 1 of the [the] Fourteenth Amendment thereof, providing that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

III

The Nebraska Legislature, in 1909, enacted House Roll No. 374 (Chapter 98 of the Session Laws of Nebraska for 1909—General Section 74-519 of the Compiled Statutes of Nebraska for 1929), which provides as follows—

"It shall be unlawful for any railroad company doing business in the State of Nebraska to operate or run over its road or any part thereof, or suffer or permit to be run over its road or any part thereof, outside of the yard limits, any passenger, mail or express train carrying passengers, whose regular equipment consists of more than five cars, with a crew, consisting of less than one engineer, one fireman, one conductor, one brakeman and one flagman; and further provided, passenger trains whose regular equipment consists of five cars or less, may be operated with a crew consisting of one engineer, one fireman, one conductor and one brakeman or flagman. (1909 p. 405; Ann. 1066x8; Comp. 4690s1; R. S. 1913, 5991; C. S. 1922, 5336.)"

[fol. 4] This Statute, as indicated, requires, under the conditions specified, the participation in the operation of the train of certain qualified train operatives, but does not assume to specify what titles or designations the said train operatives shall carry on the records of their employers.

As hereinafter particularly detailed, the Defendants contemplate and threaten to wrongfully and unlawfully so administer the afore quoted Statute as to impose on Plaintiff illegal financial burdens and exactions, and occasion a disruption and disorganization of part of Plaintiff's passenger train operations.

IV

On April 3, 1928, one J. F. Moredick, acting as the duly elected and acting Chairman of the Nebraska State Legis-

lative Board of the Brotherhood of Railroad Trainmen, an organization of white railroad brakemen, filed a complaint before the Nebraska State Railway Commission charging Plaintiff with operating its passenger trains Numbers 109 and 110 in violation of the afore quoted Statute, in that the requirement of one brakeman as a member of the passenger crews was not complied with, as the trainman doing the brakeman's work was referred to by another designation. At the hearing on such complaint, the evidence disclosed that the crews operating Plaintiff's said passenger trains, consisted of one engineer, one fireman, one conductor, one flagman and one baggageman and porter, and that each member of said train crews was competent and qualified in every respect to perform the duties of his respective position, the "baggageman and porter" competently performing the duties of the brakeman; and on June 2, 1928, the said complaint was dismissed.

On January 20, 1931, said J. F. Moredick again filed a complaint before the Nebraska State Railway Commission, again alleging that for the reason above indicated, the Plaintiff operated its passenger trains, Numbers 109 and 110, in violation of the afore quoted Statute; and upon a hearing, the evidence being substantially the same, the Commission on March 1, 1932, again dismissed the complaint.

On April 8, 1932, said J. F. Moredick sought a rehearing of the said March 1, 1932 action of the Commission. A re-[fol. 5] hearing was granted, but not any additional evidence was offered by the Complainant. However, the defendant Railroad Company, the Plaintiff herein, on July 11, 1932, submitted additional evidence showing that Plaintiff's passenger trains were operated with crews consisting of one engineer, one fireman, one conductor, one flagman and one "brakeman and porter," and that each of said members of the train crews were qualified in every way to discharge the duties of their respective positions, the "brakeman and porter" competently performing the duties of the brakeman, and, when the brakeman's duties permitted, doing some porter work. All of said showing was uncontroverted. The evidence further showed that the said passenger trains had been operated in the manner described for more than a decade, and that the other railroads in Nebraska operate their passenger trains in like manner.

On October 13, 1932, the Commission entered its Order (Formal Complaint No. 682, Supplement No. 1) in the matter as follows—

"BEFORE THE NEBRASKA STATE RAILWAY COMMISSION

J. F. MOREDICK, Plaintiff,

vs.

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA, Defendant

Formal Complaint No. 682. Supplement No. 1

By the Commission:

STATEMENT OF FACTS

This complaint was filed by J. F. Moredick on behalf of the Brotherhood of Railway Trainmen against the Missouri Pacific Railroad Corporation in Nebraska on January 20, 1931, alleging that the defendant was operating trains Nos. 109 and 110 without a full crew as required by law. The defendant answered that the required number of qualified men were employed on said trains but admitted that one bore the title of trainman or porter. The issues were joined on February 26, 1931, and the matter was heard on March 27, 1931. The hearing was concluded on April 10, 1932, and there being little or no dispute as to the facts, the only dispute being as to the interpretation of Section 74-519, C. S. [fol. 6] of 1929, an opinion on the questions of law involved was requested from the Commission's counsel. On receipt of this opinion the Commission did, on March 1, 1932, enter an order finding for the defendant and dismissing said Formal Complaint No. 682.

Thereafter and on April 8, 1932, the complainant filed motion for rehearing, which motion for rehearing was heard on May 20, 1932, and by order entered May 27, 1932, said motion was sustained and rehearing ordered. Said rehearing was held on July 11, 1932. At this rehearing by stipulation of the parties, the testimony adduced at the formal hearing was received and additional testimony offered. Additional testimony and the opinion of the Commission were cumulative and added no additional facts to those already adduced. Said testimony did, however, in some instances clarify the testimony given at the original hearing.

Opinion

After investigation of all the testimony, the Commission is of the opinion and so finds that so far as the safety of the traveling public is concerned, the trains in question, Nos. 109 and 110, are adequately manned, and that said trains, Nos. 109 and 110, being trains of more than five cars, are being operated by five employees qualified to perform and performing the duties of one engineer, one fireman, one conductor, one brakeman, and one flagman. The Commission finds that each one of the five railroad employees of said train performs one of the duties required by said Section 74-519, and that each employee in his particular work has passed the regular examination for said work and is fully qualified to perform the same. The Commission's attention was more particularly called to the colored trainman, performing the duties of brakeman and porter. Careful investigation discloses that although this man's race and color disqualify him from holding the position of brakeman, he is capable of performing all of these duties and has passed the same examinations required of one who bears the title of brakeman. The Commission is therefore of the opinion and so finds that so far as public safety is concerned, the trains in question are adequately manned. The Commission is, however, of the opinion that so far as a lit-
[fol. 7] eral interpretation of the statutes is concerned, trains Nos. 109 and 110 are not operated by employees bearing the titles set forth in Section 74-519, which makes the defendant company liable for criminal prosecution under Section 74-522, C. S. of 1929.

Therefore, in view of the fact that this Commission does not have any criminal jurisdiction and in view of the fact that in the Commission's opinion safety for and service to the public are adequately cared for by the crew as we find it to be constituted, the Commission finds that the proper prosecuting authorities should be advised as to the facts determined by the Commission so that prosecution may result if, in the opinion of said prosecuting authorities, a misdemeanor has been committed.

Order

It Is Therefore Ordered by the Nebraska State Railway Commission that the defendant comply fully with Section 74-519, C. S. of 1929, and that the Attorney General of the

State of Nebraska be advised that on the 20th day of January, 1931, and at other times subsequent thereto, the Missouri Pacific Railroad Corporation in Nebraska, did operate over its road in Nebraska, outside of the yard limits, a passenger train carrying passengers, whose regular equipment consisted of more than five cars with a crew consisting of one man qualified to perform and performing the duties of engineer, one man qualified to perform and performing the duties of fireman, one man qualified to perform and performing the duties of conductor, one man qualified to perform and performing the duties of brakeman, and one man qualified to perform and performing the duties of flagman, but that the man qualified to perform and performing the duties of brakeman was not designated and known as brakeman, but was designated and known as trainman.

It Is Further Ordered by the Nebraska State Railway Commission that the records and files in this case and of the Commission be and they hereby are made available to the Attorney General of the State of Nebraska for his use in prosecuting the Missouri Pacific Railroad Corporation in Nebraska for the violation of any criminal statute which he may feel that this act constitutes.

[fol. 8] Made and entered at Lincoln, Nebraska, this 13th day of October 1932.

Nebraska State Railway Commission, (Signed) C. A. Randall, Chairman. (Seal.)

Attest: (Signed) J. F. Miller, Secretary."

At all times, in pleading to the afore described Complaints, Plaintiff formally denied that the Nebraska State Railway Commission had jurisdiction over the subject matter of the Complaints, for the reason that the said passenger trains, Numbers 109 and 110, operated daily in interstate commerce between the Cities of Omaha, Nebraska, and Kansas City, Missouri, and, therefore, under Article I, Section 8 of the Constitution of the United States, the Interstate Commerce Commission had sole and exclusive jurisdiction in the premises.

The Plaintiff in its Answer to the January 20, 1931 Complaint of the said J. F. Moredick, also formally pleaded that all matters therein complained of were fully adjudicated, settled and determined by the Commission in its Order of June 2, 1928, dismissing the original like complaint of the said J. F. Moredick.

V

Upon the Nebraska State Railway Commission entering its said Order (Formal Complaint No. 682, Supplement No. 1), under date of October 13, 1932, as afore described, the Administrative and Legislative Department of the Government of the State of Nebraska, having regulatory powers over Common Carriers, had exhausted the claimed jurisdiction in the premises, and had ceased to function in connection with the said complaints of J. F. Moredick; and any possible further proceeding in the matter in Nebraska Tribunals would be judicial only.

VI

As specifically recited in the afore quoted Order of the Nebraska State Railway Commission, the Plaintiff in the conduct of its passenger trains, Numbers 109 and 110, operated and operates same with a crew consisting of one man [fol. 9] qualified to perform and performing the duties of engineer, one man qualified to perform and performing the duties of fireman, one man qualified to perform and performing the duties of conductor, one man qualified to perform and performing the duties of a flagman, one man qualified to perform and performing the duties of "brakeman and porter," thereby fully meeting all requirements and intendments of said General Section 74-519 of the Nebraska Statutes. Said trainmen were and are severally designated as engineer, fireman, conductor, flagman and "brakeman and porter," and the said Statute makes no requirement whatsoever as to how or in what manner the Railroads shall entitle their employees on the trains. In addition, a qualified baggageman-expressman handles baggage and express.

The trainmen performing the duties of "brakeman and porter" on said trains, Numbers 109 and 110, were and are colored men. Said colored men pass all examinations, mental and physical, and fulfill all other requirements, set up for the qualification of "brakemen" and "flagmen." The duties of a "brakeman and porter" consist substantively of assisting the conductor in the receiving and discharging of passengers, and, under the direction of the conductor assisting in the protecting of the train operation generally, the "brakeman and porter's" place in and about the train being at or near the middle of the train, unless particular duties call him elsewhere. When the "brakeman and por-

ter's'' brakeman duties permit, he does whatever porter work may be necessary, but this is negligible in volume, and does not include cleaning of the cars, which work is done at the terminals.

VII

Under its Contract with the Brotherhood of Railroad Trainmen, the Plaintiff refrains from literally designating the colored men doing the brakemen's work on the passenger trains, Numbers 109 and 110, as ''brakemen,'' although, as specifically recited in the afore quoted Order of the Nebraska State Railway Commission, these colored men take all of the required mental and physical examinations to qualify as brakemen, and perform satisfactorily all of the brakemen's duties.

[fol. 10] Notwithstanding the afore stated arrangement as to the designation of the colored trainmen as brakemen, brought about by the Brotherhood of Railroad Trainmen, said Brotherhood of Railroad Trainmen, through its official representative, said J. F. Moredick, caused the filing of the complaints afore described, and the purpose of the complaints was not to seek any improvement in the train service of the Plaintiff Railroad Company, but, through a purposeful arbitrary, wrongful and unlawful interpretation of and administration of said Statute 74-519, to so harass and coerce Plaintiff as to force from their positions, the colored trainmen, who, for more than a decade, have faithfully and satisfactorily performed the duties of brakemen for the Plaintiff Railroad Company. In the first hearing in this matter before the Nebraska State Railway Commission, the complainant, J. F. Moredick, testified on this aspect of the matter as follows—

''I don't know, Mr. Kirk, that this is particularly material, but I just wanted to bring it to the attention of the Commission—the fact that the B. of R. T. in our general agreements committee in St. Louis in 1921, asked the Missouri Pacific Railroad to place the porter-brakeman on the B. of R. T. Seniority list, and I am going to tell the Commission, because it isn't a matter that is secret, that the principle cause for this was to not only let the white man get some of these good jobs, but to get rid of the colored men. I think Mr. Kirk will agree.'' '' (The underscoring is the writer's.)

The object, therefore, of the complaints filed by the said J. F. Moredick, was not to better the train service of the Plaintiff Company, or to advantage in any way the People of Nebraska, but, through said arbitrary, wrongful and illegal construction of the above quoted Statute, to obtain in some tribunal a finding that, as these colored men worked under the designation, on their employers' records, of "brakemen and porter" instead of under the literal designation of "brakeman," therefore, the statutory requirement of a "brakeman" in a passenger train crew would not be complied with, notwithstanding that the colored men passed every examination, mental and physical, required of brakemen, and discharged the duties of the brakeman to [fol. 11.] the entire satisfaction of the Plaintiff Railroad Company, their employer, and to the entire satisfaction of the Nebraska State Railway Commission, the regulatory body having jurisdiction over the intrastate operation of the Plaintiff Railroad Company in Nebraska.

VIII

Under Plaintiff Company's Contract with the colored Brakemen, the wage scale of these colored brakemen is approximately $120.00 per month. But, if Plaintiff was required to hire white brakemen in the place of the colored brakemen—as is the objective of said Moredick, and the defendants herein—the wage scale under the Plaintiff's contract with the white brakemen being approximately $200.00 per month, and the number of "brakemen and porters" being seven, there would be a resulting increase in the expense to the Plaintiff Company, in the operation of its passenger trains under consideration, of approximately $6,700.00 per annum. This needless expense increase would be an absolute waste of that amount of money, and an unlawful burden and unjust exaction upon Plaintiff, and upon interstate commerce, in that the services being rendered by the colored brakemen, as stated, are competent and satisfactory in every way to all interests, other than the complainant, Moredick, and his associates; and the wage scale paid to the colored brakemen is according to the mutual agreement of the said colored brakemen and the Plaintiff Company. And annual increased expense of $6,700.00 imposed on Plaintiff, and upon interstate commerce, would reflect and constitute a gross loss of at least $125,000.00.

IX

Notwithstanding all of the facts aforestated, the defendants, under a purposefully arbitrary, wrongful and unlawful construction and administration of the above quoted statute are threatening to bring criminal proceedings against the Plaintiff Railroad Company, because of the said alleged violations of said statute, and to take other steps to impose upon Plaintiff, and upon interestate commerce, the aforedescribed illegal burdens and exactions which would result from the said wrongful and unlawful [fol. 12] construction and administration of said statute, General Section 74-519 above quoted.

X

The penalty provided by the Nebraska Statute for a violation of the aforequoted statute, General Section 74-519, is set forth in General Section 74-522 of the Compiled Statutes of Nebraska for 1929, as follows—

"The officers or agents of any railroad company doing business in the State of Nebraska who shall send out [in] its road, or cause or suffer or permit to be sent out on its road, or any part thereof, outside of the yard limits, any passenger or freight train which is not manned in accordance with the provisions of this article, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars nor more than one thousand dollars for each offense and shall stand committed until such fine and costs are paid, and any railroad company in the State of Nebraska, whose officer or officers, agent or agents or any servant or servants shall be found guilty of such misdemeanor, shall be liable for any damages caused by the violation of the provisions of this article. (1909 p. 406; Ann. 10665x11; Comp. 4690s4; R. S. 1913, 5994; C. S. 1922, 5339)".

As Plaintiff Company operates trains, Numbers 109 and 110, into and out of Nebraska daily, there would be, within a year's time. 1,460 train movements which, at the maximum possible fine of $1,000.00 if a violation obtained, would represent gross fines of $1,460,000.00 per year; and, because of such excessive penalties, which the defendants unlawfully threaten to attempt to impose, the Plaintiff Rail-

road Company must seek the injunctive protection of a Court of Equity pending the determination in an orderly manner of the matter herein described.

XI

Pursuant to the said unlawful construction of said Section 74-519 of the Nebraska Statutes, and with the purpose of accomplishing a wrongful and unlawful administration of said statute, the defendants, as stated, threaten to bring criminal proceedings against the Plaintiff Railroad for each alleged violation of the said Statute, and, as there are [fol. 18] some 1400 odd passenger train movements per year, to which the said Statute is applicable, Plaintiff Railroad Company is threatened with a multiplicity of suits, which would be to its great financial detriment and harassment, and against all of which Plaintiff can be protected only through the injunctive process of this Court of Equity, and an orderly determination of the issues involved.

XII

Unless Defendants are enjoined from proceeding against the Plaintiff Company in the arbitrary, grossly unreasonable, wrongful and unlawful manner afore described, Plaintiff, in the manner aforedetailed, will be deprived of its property without due process of law, and denied the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States; and Interstate Commerce, in the manner aforedetailed, will be unlawfully and directly burdened in violation of Article 1, Section 8 of the Constitution of the United States.

XIII

As against the threatened unlawful actions of the defendants afore described, citizens of the State of Nebraska would be entitled to injunctive and permanent relief in the Equity Courts of the State of Nebraska; and Plaintiff not being a resident and citizen of the State of Nebraska, but being a resident and citizen of the State of Delaware, and the Defendants, and each of them being residents and citizens of the State of Nebraska, and the amount in controversy, exclusive of interest and costs, exceeding $3,000.00, and the cause of action stated arising under the Constitu-

tion of the United States, Plaintiff, under the rights secured to it by the Constitution of the United States, seeks in this Court like relief.

XIV

Plaintiff is without adequate remedy at law in the premises; and, unless protected by the injunctive process of this Court, will suffer great and irreparable damages for the reasons, as hereinbefore detailed, it will be subjected to innumerable, and in the aggregate, enormous fines and penalties, the recovery back of which will be impossible, [fol. 14] and because the operation of its passenger trains, particularly trains Numbers 109 and 110, between Kansas City, Missouri, and Omaha, Nebraska, will be interrupted and disorganized, with no possibility of a recovery back of the damages so suffered.

Wherefore, as Plaintiff is without adequate remedy at law, it prays—

1. That subpoenas in equity forthwith issue to the Defendants and each of them, requiring them to answer, but not under oath (answer under oath being expressly waived), the Petition of the Plaintiff herein;

2. That pending the hearing and determination of the Court as to the issuance of an Interlocutory Injunction as herein prayed, the Court issue a Restraining Order enjoining and prohibiting the Defendants, its deputies, agents and representatives, and their successors in office, through criminal proceedings, or otherwise, from attempting to enforce or administer the said General Section 74-519 of the Compiled Statutes of Nebraska for 1929, as unlawfully construed in the manner afore described and/or interfering in any way whatsoever with Plaintiff's operation of its passenger trains, particularly passenger trains No. 109 and 110, operating between Omaha, Nebraska, and Kansas City, Missouri.

3. That the Court issue its Order of Interlocutory Injunction against the Defendants and each of them, their deputies, agents and representatives and their successors in office, enjoining and restraining them from in any manner, through criminal proceedings or otherwise, attempting to so wrongfully and illegally administer or enforce Gen-

eral Section 74-519 of the Compiled Statutes of Nebraska for 1929, having to do with the crews of Railroad Passenger Trains, as to impose upon plaintiff any financial fines, burdens or exactions for alleged violations of said Statute, and from in any manner whatsoever interfering with Plaintiff's operation of its passenger trains, including its passenger trains Numbers 109 and 110, operating between Omaha, Nebraska, and Kansas City, Missouri, because of any alleged violations of said Statute.

4. That upon the final hearing, the Defendants, and each of them, their deputies, agents and representatives, and [fol. 15] their successors in office, be forever enjoined from in any manner, through criminal proceedings or otherwise, attempting to so wrongfully and illegally administer or enforce General Section 74-519 of the Compiled Statutes of Nebraska for 1929, having to do with the crews of Railroad Passenger Trains, as to impose upon Plaintiff any financial fines, burdens or exactions for alleged violations of said Statute, and from in any manner whatsoever interfering with Plaintiff's operation of its Passenger Trains, including its Passenger Trains Numbers 109 and 110, operating between Omaha, Nebraska, and Kansas City, Missouri, because of any alleged violations of said Statute.

5. Plaintiff further prays for such other and further relief as justice and equity may require.

Missouri Pacific Railroad Corporation in Nebraska,
by J. A. C. Kennedy, Its General Attorney.

Duly sworn to by J. A. C. Kennedy. Jurat omitted in printing.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANTS TO DISMISS—Filed November 17, 1933

Come now the defendants and move the court to dismiss the above-entitled suit for the reason that the facts alleged and stated in the plaintiff's petition in equity, or bill of

[fol. 16] complaint, herein are insufficient to constitute a valid cause of action in equity against the defendants.

Paul F. Good, Attorney General, W. C. Ramsey, and Edwin Vail, Assistant Attorneys General, Attorneys for the Defendants.

[File-endorsement omitted.]

IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

No. 1226. Equity

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA, Plaintiff,

vs.

HENRY J. BEAL, County Attorney, of Douglas County, Nebraska, et al., Defendants

OPINION ON OVERRULING OF MOTION TO DISMISS—Filed June 30, 1936

DONOHOE, D. J.:

The plaintiff in its petition alleged diversity of citizenship, the necessary jurisdictional amount involved, and charges that the defendants are state and county officials and law enforcement officers for their respective jurisdictions, and that the defendants, members of the Nebraska Railway Commission, are the officers and Commission having jurisdiction in the State of Nebraska over rates, service and general control of common carriers. It sets forth Section 74-519 of the Compiled Statutes of Nebraska, 1929, which provides as follows:

"It shall be unlawful for any railroad company doing business in the State of Nebraska to operate or run over its road or any part thereof, or suffer or permit to be run over its road or any part thereof, outside of the yard limits, any passenger, mail or express train carrying passengers, whose regular equipment consists of more than five cars, with a crew, consisting of less than one engineer, one fireman, one conductor, one brakeman and one flagman;

and further provided, passenger trains whose regular equipment consists of five cars [of] less, may be operated with [fol. 17] a crew consisting of one engineer, one fireman, one conductor and one brakeman or flagman."

In substance, the plaintiff alleges that it has at all times complied with the terms of said statute; that certain of its trains it operates with a crew consisting of one man, qualified to perform and performing the duties of engineer; one man qualified to perform and performing the duties of fireman; one man qualified to perform and performing the duties of conductor; one man qualified to perform and performing the duties of flagman, and one man qualified to perform and performing the duties of brakeman and porter, thereby fully meeting all requirements and intendments of said statute; that the brakeman and porter on both of said trains were and are colored men that had passed all examinations, mental and physical, and that they, and each of them, fulfill all of the requirements set up for the qualification of brakemen and flagmen within the meaning of said statute; that under a contract with the Brotherhood of railway trainmen, the plaintiff refrains from literally designating the colored men on the passenger trains in question as "brakemen," although they have all the qualifications of such, and that the said Brotherhood of railway Trainmen, through its official representative, Mr. J. F. Moredick, caused the filing of complaints before the Railway Commission, the purpose of the complaints not being to seek any improvement in the train service, but through a purposeful arbitrary, wrongful and unlawful interpretation of and administration of said statute to so harass and coerce the plaintiff as to force from their positions the colored trainmen, who for more than a decade have faithfully and satisfactorily performed the duties of brakemen for the plaintiff, and that the defendants, under a purposeful arbitrary, wrongful and unlawful construction and administration of the above quoted statute, are threatening to bring criminal proceedings against the plaintiff, because of alleged violation of said statute, and to take other steps to impose upon plaintiff and upon interstate commerce illegal burdens and exactments, which would result from a wrongful and unlawful construction and administration of said statute.

[fol. 18] The foregoing constitutes a very brief summary of the allegations of the petition, which is sufficient for our

purpose now. The allegations of the petition are quite full and complete, and embrace some matters not here referred to. These allegations are admitted by the Motion to Dismiss.

In Argument, the defendants make no point on the property rights which it is charged the defendants threaten to invade, nor do they challenge the averment that the threatened action of the defendants would deprive the plaintiff of its property rights without due process of law, nor that it would deny the plaintiff equal protection of the laws in violation of the 14th Amendment of the Constitution, nor do they deny that the plaintiff is threatened with a multiplicity of suits, to its great financial detriment and harassment.

The question presented by the Motion, upon which reliance is placed, is the question as to the jurisdiction of the Court to restrain the defendants from instituting criminal proceedings, the effect of which would be to wrongfully and unlawfully administer a statute of the State so as to impose on plaintiff illegal financial burdens. The constitutionality of the statute in question is not challenged nor involved, but it is alleged, and by the Motion admitted, that the plaintiff has fully complied with the provisions of the statute.

If the defendants are acting in excess of their authority, or in abuse of their authority, and are wrongfully claiming to be enforcing a statute, while extending its terms and provisions beyond its scope, and by so doing is threatening the plaintiff with injury, then it would seem clear that the case is one warranting equitable relief, for such conduct, it would seem under the law, [would seem under the law,] would be transcending the bounds of their official authority, and the defendants would be unlawfully assuming the right to exercise the power of government in an invasion of private property rights, and in such a case, it seems to be clear, that the private rights are entitled to adequate protection by Writ of Injunction. Green vs. Louisville & I. R. Co., 244 U. S. 499. In that case, it is clearly pointed out that "a [fol. 19] valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual."

The jurisdiction of the Court in equity in such a case was upheld by the Supreme Court of the United States in Philadelphia Co. v. Stimson, 223 U. S. 605. The right of injunc-

tion was recognized and upheld by the Circuit Court of Appeals of this Eighth Circuit in the following cases: Smith vs. Tillitson, 29 Fed. (2d) 535; Davies, Sheriff, et al. vs. Mills Novelty Co., 70 Fed. (2d) 424; Royal Baking Powder Co. vs. Emerson, 270 Fed. 431; Weyman-Bruton Co. vs. Ladd, 231 Fed. 898.

Counsel for defendants charge that this instant case should be grouped in what he terms as "Group 3"—certain cases which it is contended holds in effect "that the mere allegation that a valid state statute is about to be misconstrued by the state officers charged with its enforcement, is not sufficient to confer jurisdiction upon a Court of Equity even though the usual allegations with reference to property rights are made." As heretofore stated the allegations by the Motion are admitted to be true, and for the purpose of this Motion must be so accepted, and we are unable to make the distinction contended for by defendants' counsel. In all of the cases heretofore cited, public officials were acting or threatening to act beyond their official authority, and were contending and unlawfully assuming to exercise the power of government under a misconception or misapprehension of the law. That is the case with which we are concerned now, no matter what the facts may be as unfolded hereafter by the proof.

The Motion of the defendants will therefore be overruled. An exception will be allowed, and defendants will be allowed twenty days in which to answer, if they so elect.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION TO DISMISS—June 30, 1936

In accordance with the views expressed in the Memorandum of the Court, filed herein this date, it is

[fol. 20] Ordered, by the Court, that motion of defendants to dismiss, be, and the same is hereby overruled. Exception allowed.

Further Ordered, that defendants be, and they are hereby allowed twenty (20) days from and after this date in which to answer, if they so elect.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed July 19, 1935

Come now the defendants in the above entitled cause, and for answer to the petition in equity herein filed by the plaintiff, make the following allegations, admissions and denials:

I

Admit the allegations of paragraph I of said petition, except that the defendants aver that although the defendants were law enforcement officers for their respectively indicated jurisdictions, and members of the Nebraska State Railway Commission, as in said paragraph set forth, at the time the petition was filed, certain of the defendants have been succeeded in office by others since the commencement of the action, and their successors should be made parties defendant to this action and substituted in their respective place and stead.

II

Answering the allegations of paragraph II of the petition, defendants admit that this is a civil suit brought in equity, but deny that the same involves an amount of money, exclusive of interest and costs, exceeding the sum of $3,000.00.

Admits that the suit presents a controversy between citizens of different states.

Denies that any cause of action is stated in the petition which arises under the Constitution of the United States, either under the commerce clause contained in Article I, Section 8 thereof, or under Section I of the 14th Amendment thereto, relating to due process of law and the equal protection of the laws.

[fol. 21] III

Answering the allegations of paragraph III of said petition, admit that the Nebraska legislature in 1909 enacted Chapter 98, Session Laws of Nebraska, 1909, in substance as set out in the petition; admit that the said statute requires the participation in the operation of a railroad train of certain qualified train operators, but deny that the said statute does not assume to specify what titles or designations the said train operators shall carry on the records of their employers.

Deny that the defendants contemplate and threaten to wrongfully and unlawfully so administer the said statute as to impose on the plaintiff illegal financial burdens and exactions, and occasion a disruption and disorganization of part of plaintiff's passenger train operations.

IV

Answering the allegations of paragraph IV of said petition, defendants admit that on April 3, 1928, one J. F. Moredick filed a complaint before the Nebraska State Railway Commission charging plaintiff with operating its passenger trains Nos. 109 and 110 in violation of the aforesaid statute in that the requirement of one brakeman as a member of the passenger crews was not complied with. Admit that a hearing was had upon said complaint and same was dismissed as in the petition set out; that on January 20, 1931, said Moredick again filed a similar complaint which was also dismissed, and on April 8, 1932, a rehearing was sought by said Moredick, which was granted, and at which evidence was adduced as in the petition set forth, and that on October 13, 1932, the Nebraska State Railway Commission entered its order in said proceeding in manner and form and in words and figures as in the petition set forth.

Defendants, however, aver that the Nebraska State Railway Commission did not in its order determine that there had been any violation whatsoever on the part of the plaintiff with regard to the statute aforesaid; neither did the said Nebraska State Railway Commission find that the plaintiff had been guilty of any violation or violations thereof or order that plaintiff cease and desist therefrom, [fol. 22] nor did the Nebraska State Railway Commission order that the plaintiff do any specific act or acts, or cease and desist or refrain from doing any specific act or acts; that the order of the Nebraska State Railway Commission was in substance and effect merely that the plaintiff should fully comply with the said statute according to its terms, and that its records and files be made available to the Attorney General of the State for his use in prosecuting the plaintiff for the violation of any criminal statute which he may feel that any action of the plaintiff had violated; that the action of the Nebraska State Railway Commission amounted merely to calling the facts to the attention of the Attorney General of the State for such action as his discretion might justify, and had no legal effect.

V

Answering the allegations of paragraph V of the petition, deny that the Nebraska State Railway Commission had exhausted its jurisdiction prior to the order entered on October 13, 1932, but aver that the order as of that date entered had, as aforesaid, no legal effect, and admit that any possible further proceeding in the matter in Nebraska tribunals would be judicial only.

VI

Admit that the plaintiff in the conduct of its passenger trains Nos. 109 and 110 operated and operate same with a crew consisting of one man qualified to perform and performing the duties of engineer, one man qualified and performing the duties of fireman, one man qualified to perform and performing the duties of conductor, one man qualified to perform and performing the duties of "brakeman and porter," but deny that such operation fully meets all requirements and intendments of said statute.

Admit that said trainmen were and are severally designated as engineer, fireman, conductor, flagman and "brakeman and porter," but deny that said statute makes no requirement whatsoever as to how and in what manner the railroads shall entitle their employees on the trains.

Admit that in addition a qualified baggageman-expressman handles baggage and express.

[fol. 23] Admit that the trainmen performing the duties of "brakeman and porter" on said trains Nos. 109 and 110 were and are colored men.

Admit that said colored men pass all examinations, mental and physical, and fulfill all other requirements set up for the qualification of "brakeman" and "flagman."

Admit that the duties of a "brakeman and porter" consist substantively of assisting the conductor in the receiving and discharging of passengers, and, under the direction of the conductor assisting in the protecting of the train operation generally, the "brakeman and porter's" place in and about the train being at or near the middle of the train, unless particular duties call him elsewhere.

Admit that when the "brakeman and porter's" duties permit, he does whatever porter work may be necessary, and admit that this does not include cleaning the cars, but as to whether or not such porter work is negligible in vol-

ume these defendants have no knowledge, and, therefore, deny that the same is negligible.

VII

Answering the allegations of paragraph VII of the petition, defendants admit that the colored men doing the brakemen's work on the passenger trains Nos. 109 and 110 as brakemen take all of the required mental and physical examinations to qualify as brakemen and perform [satisfactorily] all of the brakemen's duties, but as to whether or not the plaintiff refrains from designating the said colored men as brakemen by reason of any contract with the Brotherhood of Railroad Trainmen, as in the petition set out, the defendants have no knowledge and, therefore, deny the same.

Admit that the Brotherhood of Railroad Trainmen, through its then official representative J. F. Moredick, caused the filing of the said complaints before the Nebraska State Railway Commission, but aver that they have no knowledge of the purpose of said Brotherhood or of said complainant in the filing of said complaint and, therefore, deny that the purpose of said complaint was not to seek any improvement in the train service of the plaintiff's [fol. 24] railroad company, and further deny that it was the purpose of said complaint, through a purposeful, arbitrary, wrongful and unlawful interpretation of and administration of said statute to so harass and coerce plaintiff as to force from their positions the colored trainmen.

Defendants admit that complainant Moredick gave the testimony set forth in said paragraph before the Nebraska State Railway Commission, and state that they have no knowledge on the subject, and, therefore, deny all and singular the allegations of the plaintiff that the object of the complaints filed by the said J. F. Moredick was not to better the train service of the plaintiff company, or to advantage in any way the people of Nebraska, but through an arbitrary, unlawful and illegal construction of said statute to obtain in some tribunal a finding that as these colored men worked under the designation or their employer's records of "brakeman and porter" instead of under the literal designation of "brakeman," the statutory requirement of a "brakeman" in a passenger train crew would not be complied with, notwithstanding that the

colored men passed every examination, mental and physical, required of brakemen, and discharged the duties of the brakemen to the entire satisfaction of the plaintiff railroad company, their employer, and to the entire satisfaction of the Nebraska State Railway Commission, the regulatory body having jurisdiction over the intrastate operation of plaintiff railroad company in Nebraska.

Defendants further aver that whatever the object and purpose of the Brotherhood of Railroad Trainmen or its then representative, J. F. Moredick, may have been at the time of the institution of said proceedings before the Nebraska State Railway Commission, the same is entirely immaterial in the instant action, for the reason that the order entered by the Nebraska State Railway Commission founded upon said complaints of said J. F. Moredick had no legal effect whatsoever as aforesaid, and whatsoever action may be taken hereafter towards the enforcement of said statute will be taken under the construction thereof made by the Attorney General of the State and by the law enforcement officers thereof acting under his advice and direction, and without any regard whatsoever to any object and purpose which may have been contemplated or [fol. 25] entertained by said Brotherhood of Railroad Trainmen or its then representative.

VIII

Answering the allegations of paragraph VIII of said petition, admit that the plaintiff company's contracts with the colored brakemen call for a wage scale of approximately $120.00 each per month and admit that if plaintiff were required to hire white brakemen in place of the colored brakemen (which defendants deny for lack of knowledge to have been the objective of said Moredick and expressly deny to be the object of the defendants herein) the plaintiff's wage scale with the white brakemen would be approximately $200.00 each per month and admit that the number of brakemen and porters being seven, there would be a resulting increase in the expense to the plaintiff company in the operation of its passenger trains under consideration of approximately $6,700.00 per annum.

Deny that this expense would be needless or an absolute waste of that amount of money, or an unlawful burden and an unjust exaction upon the plaintiff and upon interstate

commerce; deny that the service being rendered by the colored brakemen, as stated, are competent and satisfactory in every way to all interests other than the complainant Moredick, and his associates, for the reason that the defendants have no knowledge in that behalf.

Admit that the wage scale paid to the colored brakemen is according to the mutual agreement of the colored brakemen and the plaintiff company.

Deny that an annual increased expense of $6,700.00 imposed on plaintiff would reflect and constitute a gross loss of at least $125,000.00.

IX

Answering the allegations of paragraph IX of the petition, deny that the defendants under a [purposefully], arbitrary, wrongful and unlawful construction and administration of the above quoted statute are threatening to bring criminal proceedings against the plaintiff railroad company because of said alleged violations of said statute, or to take other steps to impose upon plaintiff, or upon [fol. 26] interstate commerce, any illegal burdens and exactions which would result from a wrongful and unlawful construction and administration of said statute.

Defendants aver that the Nebraska State Railway Commission has no intention of proceeding any further in connection with any of the matters in the premises set forth, and that none of the defendant law enforcement officers, aforesaid, have any intention to, or will act in any way to harass, coerce, impede or in any wise hinder the plaintiff in the operation of its railroad trains by reason of any alleged violation of said statute, save and except under the circumstances and conditions following, to-wit:

The Attorney General of the State has under consideration the proper construction of said statute, and if it should be determined by him that it is necessary and proper so to do in order to obtain a judicial determination of the exact meaning thereof, he may cause a test suit to be instituted in the courts of the state for some one alleged violation thereof, and cause such test suit to be prosecuted to effect so that a determination of the Supreme Court of Nebraska may be had thereon; that it is not the object and purpose of the defendant Attorney General, nor will he seek by means of such test suit or action, to [inflect] financial

penalties or loss upon the defendant prior to such time as it has been finally determined by orderly procedure in the courts of the state that the plaintiff is in fact committing acts which are violative of said statute, but that the action of the Attorney General, when taken, and of the law enforcement officers who may be called upon to assist him, will be taken solely in the interests of justice and so conducted as to cause a minimum of financial expense to the plaintiff until such final determination shall be had.

X

Answering the allegations of paragraph X of the petition, the defendants admit that the penalties provided by said statute are as set forth in the petition, and that as the plaintiff company operates trains Nos. 109 and 110 into and out of Nebraska daily, making within a year's time 1460 train movements, that at the maximum possible fine of $1,000.00 for each conviction obtained this would represent gross finds of $1,460,000.00 per year, but the defendants [fol. 27] deny that they threaten to impose any such excessive penalties, and specifically deny that they intend to or would cause successive actions for penalties to be brought against the plaintiff under said statute, but aver that, as aforesaid, they have no intention of bringing any action for penalties unless and until a test action has been brought and prosecuted to final determination, which shall effectively determine plaintiff's liability in the premises.

XI

Answering the allegations of paragraph XI of said petition, the defendants deny that they intend to bring criminal proceedings against the plaintiff railroad for each alleged violation of the said statute pursuant to an unlawful construction of said Nebraska statutes, or with the purpose of accomplishing a wrongful and unlawful administration of said statute; and defendants further deny that the plaintiff is threatened with a multiplicity of suits.

XII

Answering the allegations of paragraph XII of the petition, the defendants specifically deny that the plaintiff will be deprived of its property without due process of law,

or denied equal protection of the law, or that interstate commerce will be unlawfully and directly burdened in violation of the Constitution of the United States unless defendants are enjoined from proceeding against the plaintiff company.

XIII

Answering the allegations of paragraph XIII of the petition, defendants deny that citizens of the State of Nebraska would be entitled to injunctive and permanent relief in the equity courts of the State of Nebraska as against any threatened action of the defendants, and further deny that the plaintiff not being a resident and citizen of the State of Nebraska, but being a resident and citizen of the State of Delaware, and the defendants each being residents and citizens of the State of Nebraska, that the plaintiff is entitled to relief in this court.

XIV

Answering the allegations of paragraph XIV of the petition, defendants deny that the plaintiff is without ade-
[fol. 28] quate remedy at law in the premises; deny that the plaintiff will, unless protected by injunctive process of a court, suffer great and irreparable damage; deny that it will be subjected to innumerable, and in the aggregate, enormous fines and penalties; deny that the operation of its passenger trains, particularly Trains Nos. 109 and 110 between Kansas City, Missouri and Omaha, Nebraska, will be disrupted and disorganized; and defendants further aver that if, as aforesaid, the Attorney General should determine a test suit be necessary and desirable that the same will be prosecuted in an orderly manner with as little expense to the plaintiff as it is possible to make, and for the sole purpose of determining the lawfulness of plaintiff's actions; that the defendants will not seek to interfere with the plaintiff's operation of its train or train schedules or in any way to harass or coerce the plaintiff until the final determination of said test suit.

Wherefore, having fully answered, defendants pray that plaintiff may take nothing by its petition and action as against these defendants, and each of them, but that its petition and action may be dismissed; that defendants may

recover their costs herein expended, and for all such other and further relief as justice and equity may require.

Wm. H. Wright, Attorney General, Wm. C. Ramsey, Asst. Atty. Gen'l. Edwin Vail, Asst. Atty. Gen'l. By Edwin Vail, Asst. Atty. Gen'l., Attorneys for the Defendants.

[File endorsement omitted.]

IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

No. 1226. Equity

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA, Plaintiff,

vs.

HENRY J. BEAL, County Attorney, etc., et al., Defendants

DECREE—December 2, 1938

This cause came on for hearing this day and the court, after a thorough examination of the pleadings, including the answer and the admissions therein, and a review of [fol. 29] the former memorandum opinion herein filed upon the order overruling the motion to dismiss herein filed by the defendants, is of opinion and so finds that it has already found upon the only issue which would control the judgment of the court, namely; whether or not there was a misconstruction or misinterpretation of the statute by the defendants.

The court is further of opinion and so finds, that the employment of a colored brakeman, designated as a brakeman and porter, or as a brakeman-porter, or as a porter, as described in the pleadings, was in compliance with the statute in controversy, and in view of such finding the court further finds that there is nothing further to be tried upon the merits.

The court, therefore, on its own motion directed the clerk to enter a decree for a permanent injunction as prayed by the plaintiff.

As to all of the said findings and as to the entry of said decree the defendants, and each of them, except and make

known to the court their objection to the action of the court for the reason that the same is wrong in point of law.

It Is Therefore, Ordered, Adjudged And Decreed that the defendants, and each of them, and their successors in office, be and are hereby permanently enjoined from instituting and prosecuting criminal or other proceedings against the plaintiff, its officers, agents and employees or successors in title for an alleged violation of Section 74-519 of the Compiled Statutes of Nebraska for 1929, because of the fact that the said plaintiff employs as a brakeman a properly trained or qualified colored man, or men, on its passenger train, or trains, within Nebraska, designated either as a brakeman and porter, or as a brakeman-porter, or as a porter, to which decree the defendants, and each of them, except and make known to the court their objection to the action of the court for the reason that the same is wrong in point of law.

By the Court,

J. A. Donohoe, Judge.

Endorsed: Filed Dec. 2, 1938, R. C. Hoyt, Clerk.

[fols. 30-32] In United States District Court

[Title omitted]

Notice of Appeal—Filed February 21, 1939

Notice is hereby given that the defendants and their successors in office in the above entitled cause hereby appeal to the Circuit Court of Appeals for the Eighth Circuit from the decree and final judgment entered in this action on the 2nd day of December, 1938, permanently enjoining them and each of them and their successors in office, from instituting and prosecuting criminal or other proceedings against the plaintiff, its officers, agents and employees or successors in title for an alleged violation of Section 74-519 of the Compiled Statutes of Nebraska, 1929.

Walter R. Johnson, Attorney General of Nebraska; Edwin Vail, Special Assistant; H. Emerson Kokjer, Assistant Atty. Gen., Attorneys for Appellants. Address: State Capitol Building, Lincoln, Nebraska.

[File endorsement omitted.]

Bond on Appeal for $250.00 filed February 21, 1939 omitted in printing.

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

STATEMENT OF POINTS—Filed February 21, 1939

The defendants intend to rely on appeal on the following points:

1. The Court erred in finding that the employment of a colored brakeman, designated as a brakeman and porter, or as a brakeman porter, or as a porter, as described in the pleadings, was in compliance with the provisions of Section 54-519, Compiled Statutes of Nebraska, 1929.

[fol. 34] 2. The Court erred in entering a decree permanently enjoining the defendants and each of them and their successors in office from instituting and prosecuting criminal or other proceedings against the plaintiff, its officers, agents and employees, or successors in title, for an alleged violation of Section 74-519, Compiled Statutes of Nebraska, 1929, because of the fact that the plaintiff employs as a brakeman a properly trained or qualified colored man, or men, on its passenger train, or trains, within Nebraska, designated either as a brakeman and porter, or as a brakeman-porter, or as a porter. for the following reasons:

(a) Because it does not appear that the defendants or any of them are in error in their construction of said statute, but on the contrary that the Court erred in point of law in its construction of the statute, both in its finding and in its decree.

(b) Because, assuming the defendants or any of them to be in error in their construction of the statute, even then, a decree of injunction should not have been entered in favor of the plaintiff and against the defendants, for that

(1) The statute is a valid enactment, not in conflict with any provision either of the state or the federal constitution, and equity does not afford jurisdiction to enjoin a threatened criminal prosecution, based on a valid statute, because of an alleged misconstruction of such statute by administrative state officers.

(2) To permit this suit to be entertained is to permit a suit to be prosecuted against a sovereign state by a citizen of another state in defiance of the provisions of the Eleventh Amendment to the Constitution of the United States.

Walter R. Johnson, Att'y. Gen. of Nebraska; Edwin Vail, Special Assistant; H. Emerson Kokjer, Assistant Atty. Gen., Attorneys for Appellants, Address: State Capitol Building, Lincoln, Nebraska.

[File endorsement omitted.]

[fol. 35] IN UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS OF RECORD ON APPEAL—Filed February 21,1939

The defendants designate the following portions of the record and proceedings to be contained in the record on appeal, to-wit:

1. Petition.
2. Motion to Dismiss.
3. Opinion of the court in ruling on motion to dismiss.
4. Order overruling motion to dismiss.
5. Answer of defendant.
6. Decree of December 2, 1938, enjoining the defendants and each of them and their successors in office from instituting and prosecuting criminal or other proceedings against the plaintiff, its officers, agents and employees or successors in title for an alleged violation of Section 74-519 of the Compiled Statutes of Nebraska for 1929.

Walter R. Johnson, Attorney General of Nebraska, Edwin Vail, Special Assistant, H. Emerson Kokjer, Assistant Atty. Gen., Attorneys for Defendants.

[File endorsement omitted.]

ACCEPTANCE OF SERVICE—Filed February 21, 1939

J. A. C. Kennedy, G. L. DeLacy, & R. E. Svoboda, attorneys for the defendants in the above entitled action do hereby acknowledge receipt of a copy of the above and fore-

going designation of contents of record on appeal and accept service thereof this 21st day of February, 1939.

J. A. C. Kennedy, G. L. DeLacy, A. E. Svoboda, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 36] In United States District Court, District of Nebraska, Omaha Division

Clerk's Certificate to Transcript

I, R. C. Hoyt, Clerk of the District Court of the United States within and for the District of Nebraska, hereby certify that pursuant to the order of court and in compliance with the Designation of Contents of Record on Appeal, a copy of which is found on page 46 hereof, the foregoing record has been made, and that the same is a true and faithful transcript of the pleadings and proceedings on file and of record in said Court in the case of Missouri Pacific Railroad Corporation in Nebraska vs. Henry J. Beal, County Attorney, etc., et al., No. 1226 Equity.

I further certify that on the 21st day of February, 1939, copy of Notice of Appeal was mailed to Kennedy, Holland, DeLacy & Svoboda, attorneys for plaintiff.

Witness my hand and the seal of said Court this 29th day of March, 1939. R. C. Hoyt, Clerk, By Mary A. Mullen, Chief Deputy.

[File endorsement omitted.]

[fol. 37] Appearances of counsel omitted in printing.

[fol. 38] In United States Circuit Court of Appeals, Eighth Circuit

Order of Submission—November 6, 1939

This cause having been called for hearing in its regular order, argument was commenced by Mr. Edwin Vail for appellants, continued by Mr. G. L. DeLacy for appellee, and concluded by Mr. H. Emerson Kokjer for appellants.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein, with leave to appellee to forthwith file printed copies of Additional Authorities and Appellant to reply thereto within two days from today.

[fol. 39] IN UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT

No. 11,465—November Term, A. D. 1939

HENRY J. BEAL, County Attorney of Douglas County, Nebraska, et al., Appellants,

vs.

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA, Appellee

Appeal from the District Court of the United States for the District of Nebraska

Mr. Edwin Vail, Assistant Attorney General, and Mr. H. Emerson Kokjer, Assistant Attorney General (Mr. Walter R. Johnson, Attorney General, was with them on the brief) for Appellants.

Mr. G. L. DeLacy (Mr. J. A. C. Kennedy, Mr. Yale C. Holland, Mr. E. J. Svoboda and Mr. R. E. Svoboda were with him on the brief) for Appellee.

Before Stone, Gardner and Sanborn, Circuit Judges

OPINION—January 18, 1940

GARDNER, Circuit Judge, delivered the opinion of the court.

This was a suit in equity brought by the Missouri Pacific Railroad Corporation in Nebraska, a Delaware corporation, against appellants, who include the Attorney General of the State of Nebraska and certain other law enforcing [fol. 40] officers of that state, to enjoin them from certain threatened unlawful acts in the enforcement of the Nebraska Full Train Crew Law as interpreted by such officers. It will be convenient to refer to the parties as they were designated below. Defendants moved to dismiss the suit

for want of equity, which motion was denied, whereupon they filed answer.

The Full Train Crew Law of Nebraska requires that all trains of more than five cars shall have a crew consisting of not less than one engineer, one fireman, one conductor, one brakeman and one flagman, and that the trains of less than five cars shall have a crew consisting of one engineer, one fireman, one conductor, and one brakeman or flagman. It appears from the allegations and admissions in the pleadings, that plaintiff's passenger trains No. 109 and No. 110 operate with crews consisting of "one man qualified to perform and performing the duties of engineer, one man qualified to perform and performing the duties of fireman, one man qualified to perform and performing the duties of conductor, one man qualified to perform and performing the duties of a flagman, and one man qualified to perform and performing the duties of brakeman, designated 'brakeman and porter'"; that the trainmen performing the duties of "brakeman and porter" on these trains No. 109 and No. 110 were and are colored men who have passed all examinations, mental and physical, and fulfilled all other requirements set up for the qualification of "brakeman" and "flagman"; that the duties of a "brakeman and porter" consist substantially of assisting the conductor in the receiving and discharging of passengers, and, under the direction of the conductor, assisting in protecting the train operation generally; that the "brakeman and porter's" place in and about the train is at or near the middle of the train, unless particular duties call him elsewhere; that when his duties as brakeman permit, he does whatever porter work may be necessary, but this is negligible in volume and does not include cleaning the cars, which work is done at the terminals. That in an original proceeding to enforce this Full Train Crew Law, instituted before the Railway Commission of Nebraska, to compel the Railroad Company to discharge the colored men and hire white men as brakemen, the individual instituting the proceedings testified, among other things, "that the principal cause for this was to not only let the white men get some of these good jobs, but to get rid of the colored men"; that this individual filed a complaint before the Nebraska State Rail-
[fol. 41] way Commission, charging the plaintiff Railroad Company with operating its passenger trains No. 109 and No. 110 in violation of the statute, in that the requirement of

one brakeman was not complied with, as the trainmen who did the brakeman's work was referred to by another designation; that this proceeding was dismissed by the Commission, but on January 20, 1931, the same party again filed a complaint with the Railway Commission, charging a violation of the statute, which complaint was again dismissed by the Commission on March 1, 1932, but in April, 1932, on application of this same party, a rehearing was granted. That at that hearing evidence was offered to the effect that the "brakeman and porter," and each of the members of the train crew, were qualified in every way to discharge the duties of their respective position and the "brakeman and porter" completely performed the duties of the brakeman and when the brakeman's duties permitted he did some porter work. That in its order, the State Railway Commission recited that after investigation of all the testimony, it was of the opinion, and so found, that so far as the safety of the traveling public was concerned the trains in question, No. 109 and No. 110, were adequately manned and were being operated by five employees qualified to perform and performing the duties of one engineer, one fireman, one conductor, one brakeman, and one flagman; that each one of the five employees of said trains performed regularly one of the duties required by the Full Train Crew Law, and that each employee, in his particular work, had passed the regular examination for said work and was fully qualified to perform the same; that "the Commission's attention was more particularly called to the colored trainmen, performing the duties of brakeman and porter. Careful investigation discloses that although this man's race and color disqualify him from holding the position of brakeman, he is capable of performing all of these duties and has passed the same examinations required of one who bears the title of brakeman. The Commission is therefore of the opinion and so finds that so far as public safety is concerned, the trains in question are adequately manned. The Commission is, however, of the opinion that so far as a literal interpretation of the statutes is concerned, trains Nos. 109 and 110 are not operated by employees bearing the titles set forth in Section 74-519, which makes the defendant company liable for criminal prosecution under Section 74-522, [fol. 42] C. S. of 1929. Therefore, in view of the fact that this Commission does not have any criminal jurisdiction and in view of the fact that in the Commission's opinion safety

for and service to the public are adequately cared for by the crew as we find it to be constituted, the Commission finds that the proper prosecuting authorities should be advised as to the facts determined by the Commission so that prosecution may result if, in the opinion of said prosecuting authorities, a misdemeanor has been committed." That the Commission then ordered the Railroad Company to comply with Section 74-519, C. S. of 1929 as it construed that section, and that the Attorney General be advised that the Railroad Company did and is operating passenger trains over its line in Nebraska with a properly qualified crew, except that "the man qualified to perform the duties of brakeman was not designated and known as brakeman, but was designated and known as trainman"; that the order further recites that the records and files of the Commission are made available to the Attorney General of the state for his use in prosecuting the Railroad Company for violation of the statute. That under plaintiff's contract with the colored brakemen the wage scale is $120.00 per month, but if plaintiff were required to hire white brakemen in place of the colored brakemen the wage scale under plaintiff's contract with B. of R. T., would approximate $200.00 per month, and that the substitution of white brakemen in place of the colored brakemen would result in increasing plaintiff's expense in operating its passenger trains under consideration in Nebraska, to the extent of $6,700.00 per year.

The penalty provided by the Nebraska statute for a violation of this Full Train Crew Law is a fine of not less than $100.00 nor more than $1,000.00 for each offense. During one year there would be 1460 train movements of these trains No. 109 and No. 110, which, at the maximum possible fine of $1,000.00, would represent gross fines of $1,460,000.00 per year.

Following the action of the State Railway Commission in referring the matter to the Attorney General of the State of Nebraska for prosecution, plaintiff brought this suit. The court entered decree on the allegations and admissions of the pleadings, enjoining defendants from instituting or prosecuting criminal or other proceedings against plaintiff, its officers, agents and employees for an alleged violation of Section 74-519 of the Compiled Statutes of Nebraska for 1929, because of the fact that it employed as brakeman a [fol. 43] properly trained and qualified colored man or men

on its passenger train or trains in Nebraska, designating them as "brakeman and porter," or as "brakeman-porter."

Defendants, in seeking reversal, contend that: (1) The court erred in finding that the employment of a colored brakeman designated as a brakeman and porter, or as a brakeman-porter, or as a porter, as described in the pleadings, was a compliance with the provisions of Section 74-519, Compiled Statutes of Nebraska for 1929, and in entering a decree permanently enjoining the defendants and each of them and their successors in office from instituting and prosecuting criminal or other proceedings against the plaintiff because of the fact that the plaintiff employs as a brakeman a properly trained or qualified colored man, or men, on its passenger train, or trains, designated either as a brakeman and porter, or as a brakeman-porter, or as a porter. (2) Assuming the defendants or any of them to be in error in construction of the statute, even then a degree of injunction should not have been entered in favor of the plaintiff and against the defendants, for that the statute is not assailed as in conflict with any provision either of the State or Federal Constitution and equity does not afford jurisdiction to enjoin a threatened criminal prosecution based on a valid statute because of the alleged misconstruction of such statute by administrative state officers. (3) This suit may not be entertained, as it is in reality a suit against a sovereign state by a citizen of another state and is forbidden to be brought by the provisions of the Eleventh Amendment to the Constitution of the United States.

Section 74-519, Compiled Statutes of Nebraska for 1929, commonly known as the Full Train Crew Law, so far as here pertinent, provides that,

"It shall be unlawful for any railroad company doing business in the State of Nebraska to operate or run over its road or any part thereof, or suffer or permit to be run over its road or any part thereof, outside of the yard limits, any passenger, mail or express train carrying passengers, whose regular equipment consists of more than five cars, with a crew consisting of less than one engineer, one fireman, on- conductor, one brakeman and one flagman; and further provided, passenger trains whose regular equipment consists of five cars or less, may be operated with a crew consisting of one engineer, one fireman, one conductor and one brakeman or flagman."

[fol. 44] Section 74-522, Compiled Statutes of Nebraska for 1929, prescribes the penalties for violations of the Full Train Crew Law, and these penalties have already been noted.

The statute, passed in the exercise of the State's police power, was designed to promote the safety of passengers and employees of the Railroad Company. It is the contention of plaintiff that it has fully complied with this statute, but that the enforcing officers of the state have misconstrued the statute, and that if enforced according to such misconstruction it would be an unconstitutional invasion of plaintiff's property rights. Plaintiff has equipped its trains with a full crew, complying at least numerically with the provisions of the statute. It has designated one of its crew as a "brakeman and porter," or "brakeman-porter." This man takes exactly the same examinations, mental and physical, required of white brakemen and flagmen, and the Nebraska State Railway Commission has determined, after a careful investigation, that "so far as public safety is concerned, the trains in question are adequately manned," and that "safety for and service to the public are adequately cared for by the crew." These employees do the work of brakemen to the entire satisfaction of the Railroad Company and to the entire satisfaction of the Nebraska State Railway Commission. The fact that they may do some porter work, if and when their duties as brakemen permit, is not, we think, material. Under the record they are primarily brakemen and perform all the duties of such an employee. The act, as we have observed, is a safety measure, and not one primarily in the interest of any particular employees or class of employees.

Appellants rely strongly upon the decision of the Supreme Court of Pennsylvania in Public Service Commission v. B. & O. R. Co., 260 Pa. 323, 103 Atl. 724. In that case, a dining car conductor who did not in fact perform the duties of a brakeman, but who might be required by the conductor to act as such, was held not to be a brakeman within the provisions of the act. But the evidence conclusively showed that the dining car conductor had to remain in the dining car and perform all the duties of dining car conductor and had never at any time done any of a brakeman's work nor been called upon to so act. There was confessedly in that case not a full crew as required by the statute. In the [fol. 45] instant case, however, the brakeman-porter, fully

qualified mentally and physically as a brakeman, performs all the brakeman's work on the trains, and in addition, if and when his duties as brakeman permit, also does some porter work. We think there has been a compliance with both the letter and the spirit of the act.

A court of equity has no criminal jurisdiction, and as a general rule will not grant an injunction to stay criminal or quasi-criminal proceedings. It may, however, interpose for the protection of property rights, and if the injurious acts constituting an invasion of property rights will result in irreparable injury, then the court may grant an injunction to restrain the commencement of criminal proceedings based upon an unconstitutional or otherwise invalid statute, and such injunctive relief may be granted where the threatened prosecution is based upon a misinterpretation of a valid law if, at least as so interpreted, the statute would be unconstitutional. Pennsylvania Company v. Stimson 223 U. S. 605; Greene v. Louisville & I. R. Co. 244 U. S. 499; Royal Baking Powder Co. v. Emerson (C. C. A. 8) 270 Fed. 429; Weyman-Bruton Co. v. Ladd (C. C. A. 8) 231 Fed. 898; Ross v. Goodwin (D. C., N. H.) 40 Fed. (2d) 532; Chambers v. Bachtel (C. C. A. 5) 55 Fed. (2d) 851; Stuart v. Utility Investing Corp. (C. C. A. 3) 78 Fed. (2d) 279; Truax v. Raich 239 U. S. 33; Sterling v. Constantin 287 U. S. 378.

It is urged by appellants that a court of equity is without jurisdiction because it is not claimed that the statute is unconstitutional. But the right to injunctive relief against an officer threatening wrongful acts may be invoked whether the officer is acting under an unconstitutional statute or in excess of his authority under a constitutional statute. In this case, plaintiff charges an abuse of power, and as said in Philadelphia Company v. Stimson, supra,

"In this, there is no attempt to restrain a court from trying persons charged with crime, or the grand jury from the exercise of its functions, but the injunction binds the defendant not to resort to criminal procedure to enforce illegal demands. * * * Where the officer is proceeding under an unconstitutional act, its invalidity suffices to show that he is without authority, and it is this absence of lawful power and his abuse of authority in imposing or enforcing, in the name of the state, unwarrantable exactions or restrictions, to the irreparable loss of the complainant, which is [fol. 46] the basis of the decree. Ex parte Young, 209 U. S.

p. 159, 52 L. ed. 728, 13 L. R. A. (N. S.) 932, 28 Sup. Ct. Rep. 441, 14 A. & E. Ann. Cas. 764. And a similar injury may be inflicted, and there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government against the individual owner, is guilty of an invasion of private property. * * * If the complainant's rights, as against the defendant, were as claimed, it was entitled to adequate protection. And, in such case, the remedy might properly embrace the restraining of unfounded prosecutions."

In Greene v. Louisville & I. R. Co., supra, the court, in discussing the power of a court of equity to grant injunction to restrain an officer from enforcing a statute, said,

"The principle is not confined to the maintenance of suits for restraining the enforcement of statutes which, as enacted by the state legislature, are in themselves unconstitutional."

An enforcement of this statute as construed by the defendants would subject the plaintiff to a multiplicity of prosecutions. There are some 1460 train movements in a single year, and the maximum possible fine is $1000.00 for each conviction, and as each train movement would be a separate offense if operated with a crew in violation of the statute, gross penalties for a single year on these two trains might aggregate nearly one and a half million dollars.

The contention that this suit was one against the State can not be sustained. As said by the Supreme Court in Philadelphia v. Stimson, supra,

"The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded."

A suit to restrain a state officer from acts violative of plaintiff's property rights to his irreparable damage, when the officer is acting in excess of the authority granted by statute, is not a suit against the State.

[fol. 47] We conclude that the court properly exercised its equitable jurisdiction in entering the decree appealed from and it is therefore Affirmed.

[fol. 48] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 11465

HENRY J. BEAL, County Attorney of Douglas County, Nebraska, M. L. Endres, State Sheriff of Nebraska, John J. Pszanowski, Chief of Police of the City of Omaha, Nebraska, Charles B. McDonald, Sheriff of Douglas County, Nebraska, Harry Mundell, Sheriff of Sarpy County, Ed. W. Thinigan, Sheriff of Cass County, Carl Ryder, Sheriff of Otoe County, J. C. Broady, Sheriff of Nemaha County, Lewis W. Davies, Sheriff of Richardson County, and C. A. Sorensen, Attorney General of Nebraska, Charles A. Randall, John J. Miller and Hugh Drake, Members of the Nebraska State Railway Commission of the State of Nebraska, and their successors in office, Appellants,

vs.

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA

Appeal from the District Court of the United States for the District of Nebraska

DECREE—January 18, 1940

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in this cause be, and the same is hereby, affirmed with costs; and that the Missouri Pacific Railroad Corporation in Nebraska have nad recover against Henry J. Beal, County Attorney of Douglas County, Nebraska, and other appellants in this Court, the sum of Twenty Dollars for its costs herein and have execution therefor.

[fol. 49] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR REHEARING—Filed February 1, 1940

Come now the appellants and present this their petition for a rehearing of the above entitled cause and in support thereof respectfully show:

[fol. 50] Respectfully and sincerely, and with the utmost vigor, we say the opinion in this case is wrong upon the facts.

Law as to Equity Jurisdiction Correctly Stated

The law controlling the case as to when a Federal Equity Court will assume jurisdiction to enjoin enforcement of a state police power statute by its duly constituted officers was probably never better stated nor more clearly summarized than by the Court, on page 10 of its opinion in this case, as follows:

"A court of equity has no criminal jurisdiction, and as a general rule will not grant an injunction to stay criminal or quasi-criminal proceedings. It may, however, interpose for the protection of property rights, and if the injurious acts constituting an invasion of property rights will result in irreparabe injury, then the court may grant an injunction to restrain the commencement of criminal proceedings based upon an unconstitutional or otherwise invalid statute, and such injunctive relief may be granted where the threatened prosecution is based uopn a misinterpretation of a valid law if, at least as so interpreted, the statute would be unconstitutional. Pennsylvania Company v. Stimson, 223 U. S. 605; Greene v. Louisville & I. R. Co., 244 U. S. 499; Royal Baking Powder Co. v. Emerson (C. C. A. 8), 270 Fed. 429; Weyman-Bruton Co. v. Ladd (C. C. A. 8), 231 Fed. 898; Ross v. Goodwin (D. C., N. H.), 40 Fed. (2d) 532; Chambers v Bachtel (C. C. A. 5), 55 Fed. (2d) 851; Stuart v. Utility Investing Corp. (C. C. A. 3), 78 Fed. (2d) 279; Truax v. Raich, 239 U. S. 33; Sterling v. Constantin, 287 U. S. 378.

"It is urged by appellants that a court of equity is without jurisdiction because it is not claimed that the statute is unconstitutional. But the right to injunctive relief against [fol. 51] an officer threatening wrongful acts may be invoked whether the officer is acting under an unconstitutional statute or in excess of his authority under a constitutional statute."

Factual Basis of the Opinion

In this case the Court based its holding that it has equity jurisdiction upon the following findings of alleged fact, quotations being from the opinion.

Line 14, page 2:

"It appears from the allegations and admissions in the pleadings, * * *."

Second line from bottom of page 5:

"That under plaintiff's contract with the colored brakemen the wage scale is $120.00 per month, but if plaintiff were required to hire white brakemen in place of the colored brakemen the wage scale under plaintiff's contract with B. of R. T., would approximate $200.00 per month, and that the substitution of white brakemen in place of the colored brakemen would result in increasing plaintiff's expense in operating its passenger trains under consideration in Nebraska, to the extent of $6700.00 per year.

"The penalty provided by the Nebraska statute for a violation of this Full Train Crew Law is a fine of not less than $100.00 nor more than $1,000.00 for each offense. During one year there would be 1460 train movements of these trains No. 109 and 110, which, at the maximum possible fine of $1,000.00 would represent gross fine of $1,460,000.00 per year."

Page 11, last paragraph:

"An enforcement of this statute as construed by the defendants would subject the plaintiff to a multiplicity of [fol. 52] prosecutions. There are some 1460 train movements in a single year, and the maximum possible fine is $1000.00 for each conviction, and as each train movement would be a separate offense if operated with a crew in violation of the statute, gross penalties for a single year on these two trains might aggregate nearly one and a half million dollars."

Without these findings the equity jurisdiction of the Court fails under the law as stated by this Court, and the opinion has no foundation.

No Basis for These Findings of Fact

There is no basis whatever for these findings unless the bare allegations of plaintiff's petition are to be accepted as facts.

Should the Court solemnly find that the Missouri River flows up hill and empties into the mountains, it would be no

more wrong than in finding that the plaintiff in this case was threatened with a multicp-icity of suits and an invasion of its property rights, from which it would suffer great and irreparable injury. We say this seriously and do not mean to be at all flippant.

This judgment was entered upon the pleadings (Transcript of Record, pp. 28 and 29). The record contains the cold undisputed facts. There is no conflict of testimony. There is no evidence to weigh and accept or reject. We cannot change the record by any legerdemain of argument, and neither can anyone else. It will always remain as it is now. By applying well-settled rules of construction of pleadings, only one right answer can be arrived at. There is not and never was a threat of a multiplicity of suits by defendants against plaintiff. There is not and never was an invasion of plaintiff's property rights, nor a threat thereof which would cause plaintiff irreparable damage.

[fol. 53] "Judgment on the Pleadings Cannot be Rendered for Plaintiff Where His Allegations Are Sufficiently Controverted or Where the Answer Sets up a Good Defense." 49 C. J. 671.

Citing:

Williams v. Green, 23 F. (2d) 706.

Walker v. Traylor Engineering, etc. Co., 12 F. (2d) 382.

Drew v. U. S. Shipping Board Emergency Fleet Corp., 275 Fed. 620.

The following excerpts from the answer of the appellants will show that all of the allegations in the plaintiff's petition upon which the equity jurisdiction of the Court could be founded are controverted. References are to pages in the transcript of record. Emphasis indicated by italics is supplied for the purpose of this petition.

Page 21, paragraph 2:

(Defendants) "Deny that the defendants contemplate and threaten to wrongfully and unlawfully so administer the said statute as to impose on the plaintiff illegal financial burdens and exactions, and occasion a disruption and disorganization of part of plaintiff's passenger train operations."

Page 25, paragraph IX:

"Answering the allegations of paragraph IX of the petition, deny that the defendants under a (purposely), arbitrary, wrongful and unlawful construction and administration of the above quoted statute are threatening to bring criminal proceedings against the plaintiff railroad company because of said alleged violations of said statute, or to take [fol. 54] other steps to impose upon plaintiff, or upon interstate commerce, any illegal burdens and exactions which would result from a wrongful and unlawful construction and administration of said statute.

"Defendants aver that the Nebraska State Railway Commission has no intention of proceeding any further in connection with any of the matters in the premises set forth, and that none of the defendant law enforcement officers, aforesaid, have any intention to, or will act in any way to harass, coerce, impede or in any wise hinder the plaintiff in the operation of its railroad trains by reason of any alleged violation of said statute, save and except under the circumstances and conditions following, to-wit:

"(fol. 35) *The Attorney General of the State has under consideration the proper construction of said statute, and if it should be determined by him that it is necessary and proper so to do in order to obtain a judicial determination of the exact meaning thereof, he may cause a test suit to be instituted in the courts of the state for some one alleged violation thereof, and cause such test suit to be prosecuted to effect so that a determination of the Supreme Court of Nebraska may be had thereon; that it is not the object and purpose of the defendant Attorney General, nor will he seek by means of such test suit or action, to (inflect) financial penalties or loss upon the defendant prior to such time as it has been finally determined by orderly procedure in the courts of the state that the plaintiff is in fact committing acts which are violative of said statute, but that the action of the Attorney General, when taken, and of the law enforcement officers who may be called upon to assist him, will be taken solely in the interests of justice and so conducted as to cause a minimum of financial expense to the plaintiff until such final determination shall be had.*"

[fol. 55] Page 27, part of paragraph X and all of paragraph XI:

"Defendants (fol. 36) deny that they threaten to impose any such excessive penalties, and specifically deny that they intend to or would cause successive actions for penalties to be brought against the plaintiff under said statute, but *aver that, as aforesaid, they have no intention of bringing any action for penalties unless and until a test action has been brought and prosecuted to final determination, which shall effectively determine plaintiff's liability in the premises.*

"Answering the allegations of paragraph XI of said petition, the defendants deny that they intend to bring criminal proceedings against the plaintiff."

Page 27, paragraph XIV:

"Answering the allegations of paragraph XIV of the petition, defendants deny that the plaintiff is without adequate remedy at law in the premises; deny that the plaintiff will, unless protected by injunctive process of a court, suffer great and irreparable damage; *deny that it will be subjected to innumerable, and in the aggregate, enormous fines and penalties;* deny that the operation of its passenger trains, particularly Trains Nos. 109 and 110 between Kansas City, Missouri and Omaha, Nebraska, will be disrupted and disorganized; and defendants *further aver that if, as aforesaid, the Attorney General should determine a test suit be necessary and desirable that the same will be prosecuted in an orderly manner with as little expense to the plaintiff as it is possible to make* and for the sole purpose of determining the lawfulness of plaintiff's actions; *that the defendants will not seek to interfere with the plaintiff's operation of its train or train schedules, or in any way to harass or coerce the plaintiff until the final determination of said test suit.*"

[fol. 56] Plaintiffs' attorneys apparently recognized this situation and the weakness of their position on account of it, and tried to bolster up their case by citing in a supplemental brief ("Additional Authorities") filed at the moment of argument herein, the case of A. T. & S. Fe Ry. Co. v. L. Prade, 2 Fed. Supp. 855. From this case they argued that the threat of multiplicity of suits and invasion of property rights was in the statute itself, and that the threats were there, even though there were no actual threats by an officer. This decision on which their argument was based was set aside by the Supreme Court of the United States

in Ex parte La Prade, 289 U. S. 444, which specifically disapproved this theory.

We do not believe the Court meant to question the sufficiency of the assignments of error to raise this jurisdictional objection, but, if the question is raised, reference is made to paragraph 5743, page 254, Hughes, Federal Practice, Jurisdiction and Procedure, the relevant part of which is herewith quoted:

"But an objection to the jurisdiction of the trial court is one that cannot be waived, and may be raised at any time, or considered by the appellate court on its own motion; hence it need not be presented by an assignment of error."

The lack of equity jurisdiction in the United States District Court from whose decree appeal is taken was clearly pointed out in appellants' brief (See Point 3 b of "Points to be Argued," page 18, and Sections II and III (b) of the Argument, pp. 38 to 41. See also as to the admissions and allegations of Answer, pp. 7 to 14, and as to findings and decree, pp. 14 and 15, contained in the Statement) and also was argued orally at bar. However, through some inadvertence, the matters we have pointed out in this petition were [fol. 57] overlooked by the Court. The Court entirely overlooked the fact that all the allegations of the bill as to property damage and multiplicity of suits were traversed by the answers, and also entirely overlooked specific allegations contained in the answer which negative the allegations as to threatened action on the part of the Attorney General and the state law enforcement officers operating under him and set out specifically just what his purposed course of action is.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that the decree of this Court, entered on January 18, 1940, be, upon further consideration, reversed.

Respectfully submitted, Walter R. Johnson, Attorney General; H. Emerson Kokjer, Assistant Attorney General; Edwin Vail, Assistant Attorney General, Counsel for Appellants.

[fol. 58] CERTIFICATE OF COUNSEL

We, Walter R. Johnson, Attorney General of the State of Nebraska, H. Emerson Kokjer, Assistant Attorney General, and Edwin Vail, Assistant Attorney General, do

hereby certify that the foregoing petition for a rehearing of this case is presented in good faith and is believed to be meritorious and is not presented for delay.

Walter R. Johnson, Attorney General; H. Emerson Kokjer, Assistant Attorney General; Edwin Vail, Assistant Attorney General, Counsel for Appellants.

[File endorsement omitted.]

[fol. 59] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—February 12, 1940

The petition for rehearing filed by counsel for the appellants having been considered, It is now here Ordered by this Court that the same be and it is hereby denied.

In United States Circuit Court of Appeals

Praecipe for Transcript of Record—Filed May 1, 1940

To Honorable E. E. Koch, Clerk of the United States Circuit Court of Appeals, Eighth Circuit:

Please prepare for use in connection with the petition of writ of certiorari, to be presented to the Supreme Court of the United States, a transcript of the record in this case including therein:

1. The printed record on appeal from the District Court of the United States for the District of Nebraska to the United States Circuit Court of Appeals.

2. Proceedings had on appeal in the said United States Circuit Court of Appeals in the said case.

You are respectfully requested to cause the said proceedings in the United States Circuit Court of Appeals to be [fol. 60] printed and attached to the record, and the whole certified under your hand and seal.

Respectfully submitted, Walter R. Johnson, Attorney General; H. Emerson Kokjer, Assistant Attorney General; Edwin Vail, Assistant Attorney General, Counsel for Appellants.

[File endorsement omitted.]

[fol. 61] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

CLERK'S CERTIFICATE

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Nebraska as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the praecipe of counsel for appellants, in a certain cause in said Circuit Court of Appeals wherein Henry J. Beal, County Attorney of Douglas County, Nebraska, et al., were Appellants and the Missouri Pacific Railroad Corporation in Nebraska, was Appellee, No. 11465, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the twenty-sixth day of February, A. D. 1940, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the District of Nebraska.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this first day of May, A. D. 1940.

E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. (Seal.)

[fol. 62] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 44402. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 72. Henry J. Beal, County Attorney of Douglas County, Nebraska, et al., Petitioners, vs. Missouri Pacific Railroad Corporation in Nebraska. Petition for a writ of certiorari and exhibit thereto. Filed May 9, 1940. Term No. 72, O. T., 1940.

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FILED
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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. [redacted] 72

HENRY J. BEAL, COUNTY ATTORNEY OF DOUGLAS COUNTY, NEBRASKA, ET AL.,

Petitioners,

vs.

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

WALTER R. JOHNSON,
Attorney General
H. EMERSON KOKJER,
Assistant Attorney General
EDWIN VAIL,
Assistant Attorney General
Attorneys for Petitioners.

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INDEX

	Page
1. Petition for Certiorari	1
A. Summary Statement of the Matter Involved	1
B. Reasons Relied on for the Allowance of the Writ	4
2. Brief in Support of Petition	7
Opinions in the Court below	7
Jurisdiction	7
Statement of the Case	8
Specification of Errors	10
Argument	11
Conclusion	23

Table of Cases Cited

Amalgamated O. G. Corp. v. City and County of San Francisco, 263 Fed. 617	15
Arbuckle v. Blackburn, 113 Fed. 616 (C.C.A. 6th Cir.)	15
Chicago, Rock Island & Pac. Railway Co. v. Ark., 219 U. S. 453	11
Drew v. U. S. Shipping Board Emergency Fleet Corp., 275 Fed. 620	14
Ex parte La Prade, 289 U. S. 444	18
Greene v. Louisville & I. R. Co., 244 U. S. 499, 507	15
Herkness v. Irion, 11 Fed. (2) 386	15
Missouri Pacific Railroad Co. v. Norwood, 283 U. S. 249	11
Philadelphia Co. v. Stimson, 223 U. S. 605	15
Smith v. Tillitson, 29 Fed. (2) 535 (C.C.A. 8th Cir.)	15, 19
St. Louis, Iron Mountain & Southern Railroad Co. v. Ark., 240 U. S. 518	11
Topeka & Santa Fe Ry. Co. v. La Prade, 2 F. Supp. 855	18
Walker v. Traylor Engineering, etc. Co., 12 Fed. (2) 382	14
Williams v. Green, 23 Fed. (2) 796	14

Statutes and Court Rules Cited

Section 74-519 Compiled Statutes 1929	2, 8

INDEX

	Page
Section 74-522 Compiled Statutes 1929	2
Section 84-201 Compiled Statutes 1929	16
Section 84-203 Compiled Statutes 1929	16
Section 34-204 Compiled Statutes 1929	16
Section 240 (a) Judicial Code as amended by Act Feb. 13, 1925, c. 229 (43 Stat. at L. 938; Tit. 28, sec. 347 U.S.C.A.)	5
Rule 73, subdivision (b) Civil Procedure for District Courts of United States	22
Rule 75, subdivision (d) Civil Procedure for District Courts of United States	22
Supreme Court Rules, 38, 5, b.	5

Text Books and Encyclopedias Cited

Hughes on Federal Practice, Jurisdiction and Procedure, Vol. 8, page 254, paragraph 5743	23
49 C. J. 671	14

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. ——

HENRY J. BEAL, COUNTY ATTORNEY OF DOUGLAS COUNTY, NEBRASKA, ET AL.,

Petitioners,

vs.

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

MAY IT PLEASE THE COURT:

The petition of Henry J. Beal, County Attorney of Douglas County, Nebraska, and others, whose names are subscribed hereto, and their successors in office, appearing by the Attorney General of the State of Nebraska, respectfully show to this Honorable Court:

A

SUMMARY STATEMENT OF THE MATTER INVOLVED

The respondent, Missouri Pacific Railroad Corporation in Nebraska, filed its Bill in Equity in the District Court of the United States for the District of Nebraska, Omaha Division, to enjoin the Attorney General of the State of

Nebraska, and certain other law enforcement officers acting under his advice and direction, from bringing criminal proceedings to enforce the Nebraska Full Train Crew Law.*1 It was alleged that the Attorney General was proceeding under a purposeful, arbitrary, wrongful and unlawful construction and administration of said statute, and would cause property damage to the railroad, particularly because of the heavy penalties*2 which were unlawfully threatened to be attempted to be imposed.

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*1 Section 74-519 Compiled Statutes of Nebraska for 1929, is as follows:

> "It shall be unlawful for any railroad company doing business in the State of Nebraska to operate or run over its road or any part thereof, or suffer or permit to be run over its road or any part thereof, outside of the yard limits, any passenger, mail or express train carrying passengers, whose regular equipment consists of more than five cars, with a crew, consisting of less than one engineer, one fireman, one conductor, one brakeman and one flagman; and further provided, passenger trains whose regular equipment consists of five cars or less, may be operated with a crew consisting of one engineer, one fireman, one conductor and one brakeman or flagman."

*2 Penalties for violation of Section 74-519 Compiled Statutes of Nebraska for 1929, are contained in Section 74-522, Compiled Statutes of Nebraska for 1929, which is as follows:

> "The officers or agents of any railroad company doing business in the State of Nebraska, who shall send out on its road, or cause or suffer or permit to be sent out on its road, or any part thereof, outside of the yard limits, any passenger or freight train which is not manned in accordance with the provisions of this article shall be guilty of a misdemeanor, and upon conviction

The defendants, who are the petitioners herein, in their answer:

"Deny that the defendants under a (purposefully), arbitrary, wrongful and unlawful construction and administration of the above quoted statute are threatening to bring criminal proceedings against the plaintiff railroad company because of said alleged violations of said statute, or to take other steps to impose upon plaintiff, or upon interstate commerce, any illegal burdens and exactions which would result from a wrongful and unlawful construction and administration of said statute.

Defendants aver * * * that none of the defendant law enforcement officers, aforesaid, have any intention to, or will act in any way to harass, coerce, impede or in any wise hinder the plaintiff in the operation of its railroad trains by reason of any alleged violation of said statute, save and except under the circumstances and conditions following, to-wit:

(fol. 35) The Attorney General of the State has under consideration the proper construction of said statute, and if it should be determined by him that it is necessary and proper so to do in order to obtain a judicial determination of the exact meaning thereof, he may cause a test suit to be instituted in the courts of the state for some one alleged violation thereof, and cause such test suit to be prosecuted to effect so that a determination of the Supreme Court of Nebraska may be had thereon; that it is not the object and purpose of the defendant Attorney General, nor will he seek by

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thereof shall be fined not less than one hundred dollars nor more than one thousand dollars for each offense and shall stand committed until such fine and costs are paid, and any railroad company in the State of Nebraska whose officer or officers, agent or agents or any servant or servants shall be found guilty of such misdemeanor, shall be liable for any damage caused by the violation of the provisions of this article."

means of such test suit or action, to (inflect) financial penalties or loss upon the defendant prior to such time as it has been finally determined by orderly procedure in the courts of the state that the plaintiff is in fact committing acts which are violative of said statute, but that the action of the Attorney General, when taken, and of the law enforcement officers who may be called upon to assist him, will be taken solely in the interests of justice and so conducted as to cause a minimum of financial expense to the plaintiff until such final determination shall be had." (Record pp. 25-26.)

The federal District Court entered judgment on the pleadings and without evidence, and granted the injunctive relief demanded. (Record pp. 28-29.)

On appeal the Circuit Court of Appeals, Eighth Circuit, affirmed the decree appealed from, but without considering the question of equity jurisdiction under the facts as disclosed by the pleadings. (Record pp. 39-48.)

The failure of the Circuit Court of Appeals to consider the matter of equity jurisdiction was specifically challenged to its attention in a petition for rehearing (Record pp. 49-58), which was denied. (Record p. 59.)

B

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

It is the contention of the petitioners that the injunction allowed by the federal District Court entirely lacked *factual basis;* that the Court was wholly without jurisdiction in equity to enter same; that the action of the United States Circuit Court of Appeals for the Eighth Circuit, in failing to recognize this question, and its further refusal to consider the question when directly presented on a petition for rehearing, evidences that the said Circuit Court of Ap-

peals (1) has decided an important question of general law in a way untenable and in conflict with the weight of authority; (2) has decided a federal question (i. e., equity jurisdiction of the federal District Court) in a way in conflict with applicable decisions of this court; and (3) has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court from which the appeal was taken, as to call for an exercise of this Court's power of supervision. (Rules 38, 5, b.)

Wherefore, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and of proceedings in the case numbered and entitled on its docket, No. 11,465 - Civil - Henry J. Beal, County Attorney of Douglas County, Nebraska, et al., Appellants, v. Missouri Pacific Railroad Corporation in Nebraska, Appellee, and that the said Decree of the United States District Court for the District of Nebraska, Omaha Division, may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioners will ever pray.

Henry J. Beal, County Attorney of Douglas County, Nebraska, M. L. Endres, State Sheriff of Nebraska, John J. Pszanowski, Chief of Police of the City of Omaha, Nebraska, Charles B. McDonald, Sheriff of Douglas County, Nebraska, Harry Mundell, Sheriff of Sarpy County, Ed W. Phingan, Sheriff of Cass County, Carl Ryder, Sheriff of Otoe County, J. C. Broady,

Sheriff of Nemaha County, Lewis W. Davies, Sheriff of Richardson County, and C. A. Sorensen, Attorney General of Nebraska, Charles A. Randall, John J. Miller and Hugh Drake, Members of the Nebraska State Railway Commission of the State of Nebraska, and their successors in office, Petitioners.

By Walter R. Johnson
Attorney General
H. Emerson Kokjer
Assistant Attorney General
Edwin Vail
Assistant Attorney General
Their Attorneys.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. ____

HENRY J. BEAL, COUNTY ATTORNEY OF DOUGLAS COUNTY, NEBRASKA, ET AL.,

Petitioners,

vs.

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA,

Respondent.

BRIEF IN SUPPORT OF PETITION

OPINIONS IN THE COURT BELOW

Opinion of District Court on overruling of motion to dismiss, filed June 30, 1936 (Record, p. 16), not reported, should be considered in connection with the decree of the District Court allowing injunction dated December 2, 1938. (Record p. 28.)

Opinion of the Circuit Court of Appeals, Eighth Circuit, was filed January 18, 1940, and appears at pages 39-47 of the Record. It is reported in 108 Fed. (2d) 897, (adv. sheets).

JURISDICTION

Decree of United States Circuit Court of Appeals, Eighth Circuit, was entered in conformity with its opinion, on January 18, 1940. Petition for rehearing challenging the at-

tention of that Court to the exact question here presented, was filed February 1, 1940 (Record pp. 49-58). An order was entered by the Circuit Court of Appeals denying the petition for rehearing on February 12, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (43 Stat. at L. 938; Tit. 28, sec. 347 U. S. C. A.).

STATEMENT OF THE CASE

The Missouri Pacific Railroad Corporation in Nebraska, a Delaware Corporation, brought this action in the United States District Court for the District of Nebraska, Omaha Division, against the petitioners who include the Attorney General of the State of Nebraska and certain other law enforcement officers who act under his advice and direction, to enjoin them from bringing criminal proceedings to enforce the Nebraska Full Train Crew Law. The law in question is Section 74-519, Compiled Statutes of Nebraska for 1929, and is set out in a foot-note in the petition (ante p. 2). The section of the statute providing penalties for violation is also set out in a foot-note in the petition (ante p. 2).

It will not be necessary to discuss the provisions of said law, nor the supposed misinterpretation of the law under which the respondent alleged that the Attorney General and the law enforcement officers acting under him were threatening to proceed. It is sufficient here to point out that injunctive relief was sought to restrain the law enforcement officers from bringing criminal prosecutions under said statute which it was alleged would occasion property damage to the railroad, particularly because of heavy and excessive penalties provided by statute for daily violations of the act which it was alleged that the law enforcement officers were threatening to attempt to impose.

The Attorney General and the other law enforcement officers, who act under his advice and direction, answered traversing all allegations of property damage, and in the answer specifically:

"Deny that the defendants under a (purposefully), arbitrary, wrongful, and unlawful construction and administration of the above quoted statute are threatening to bring criminal proceedings against the plaintiff railroad company because of said alleged violations of said statute, or to take other steps to impose upon plaintiff, or upon interstate commerce, any illegal burdens and exactions which would result from a wrongful and unlawful construction and administration of said statute.

Defendants aver * * * that none of the defendant law enforcement officers, aforesaid, have any intention to, or will act in any way to harass, coerce, impede or in any wise hinder the plaintiff in the operation of its railroad trains by reason of any alleged violation of said statute, save and except under the circumstances and conditions following, to-wit:

(fol. 35) The Attorney General of the State has under consideration the proper construction of said statute, and if it should be determined by him that it is necessary and proper so to do in order to obtain a judicial determination of the exact meaning thereof, he may cause a test suit to be instituted in the courts of the state for some one alleged violation thereof, and cause such test suit to be prosecuted to effect so that a determination of the Supreme Court of Nebraska may be had thereon; that it is not the object and purpose of the defendant Attorney General, nor will he seek by means of such test suit or action, to (inflect) financial penalties or loss upon the defendant prior to such time as it has been finally determined by orderly procedure in the courts of the state that the plaintiff is in fact committing acts which are violative of said statute, but that the action of the Attorney General, when taken, and of

the law enforcement officers who may be called upon to assist him, will be taken solely in the interests of justice and so conducted as to cause a minimum of financial expense to the plaintiff until such final determination shall be had." (Record pp. 25-26.)

The federal District Court entered judgment on the pleadings and without evidence and granted the injunctive relief demanded. (Record pp. 28 and 29.) On appeal the Circuit Court of Appeals, Eighth Circuit, affirmed the decree appealed from but without considering the question of equity jurisdiction under the facts disclosed by the pleadings. (Record pp. 39-48.)

The failure of the Circuit Court of Appeals to consider the matter of equity jurisdiction was specifically challenged to its attention in a petition for rehearing (Record pp. 49-58), which was denied. (Record p. 59.)

SPECIFICATION OF ERRORS

The Court erred in sustaining a decree enjoining the chief law enforcement officer of the State of Nebraska and other law enforcement officers acting under his advice and direction, from bringing criminal proceedings to secure a proper construction of a state statute, since judgment was on the pleadings, and it was nowhere admitted in the pleadings that property damage would be sustained by the respondent but, on the contrary, it appeared affirmatively that it was the intention of the Attorney General, if it should be determined by him to be necessary and proper so to do, to cause a test suit to be instituted in the Courts of the state for some one alleged violation of said statute, and cause such test suit to be prosecuted to effect in the highest Court of the state, and that the action of the Attorney General, when taken, would be taken solely in the interest of justice and so conducted as to cause a minimum of finan-

cial expense to the plaintiff until such final determination should be had. We insist that the failure of the Circuit Court of Appeals to consider this matter of equity jurisdiction in its original opinion, and its refusal to grant a petition for rehearing specifically challenging the question to its further consideration, constitutes error, and that it appears that the said Circuit Court of Appeals has erred (1) in deciding an important question of general law in a way untenable and in conflict with the weight of authority; (2) that it has erred in deciding a federal question (i. e., equity jurisdiction of the federal District Court) in a way in conflict with applicable decisions of this Court; and (3) that it has erred in so departing from the accepted and usual course of judicial proceedings, and so sanctioned such departure by the District Court from which the appeal was taken, as to call for an exercise of this Court's power of supervision.

ARGUMENT

There is no dispute as to the validity of the Nebraska Full Train Crew Law. Similar state laws have been sustained in this Court against constitutional attack.

Chicago, Rock Island and Pacific Railway Co. v. *Arkansas*, 219 U. S. 453.

St. Louis, Iron Mountain & Southern Railroad Co. v. *Arkansas*, 240 U. S. 518.

Missouri Pacific Railroad Co. v. *Norwood*, 283 U. S. 249.

The basis of respondent's Bill in Equity was (1) an alleged misconstruction of the act, and (2) threatened property damage which would result in irreparable injury to the respondent. This claimed basis for the interposition of equity was recognized by the Circuit Court of Appeals, in its opinion below wherein it said:

"A court of equity has no criminal jurisdiction, and as a general rule will not grant an injunction to stay criminal or quasi-criminal proceedings. It may, however, interpose for the protection of property rights, and if the injurious acts constituting an invasion of property rights will result in irreparable injury, then the court may grant an injunction to restrain the commencement of criminal proceedings based upon an unconstitutional or otherwise invalid statute, and such injunctive relief may be granted where the threatened prosecution is based upon a misinterpretation of a valid law if, at least as so interpreted, the statute would be unconstitutional. *Pennsylvania Company* v. *Stimson*, 223 U. S. 605; *Greene* v. *Louisville & I. R. Co.*, 244 U. S. 499; *Royal Baking Powder Co.* v. *Emerson* (CCA8) 270 Fed. 429; *Weyman-Brutton Co.* v. *Ladd* (CCA8) 231 Fed. 898; *Ross* v. *Goodwin* (D. C., N. H.) 40 Fed. (2d) 532; *Chambers* v. *Bachtel* (CCA5) 55 Fed. (2d) 851; *Stuart* v. *Utility Investing Corp.* (CCA3) 78 Fed. (2d) 279; *Truax* v. *Raich*, 239 U. S. 33; *Sterling* v. *Constantin*, 287 U. S. 378."

Both the District Court and the Circuit Court, however, fell into error in supposing that *threatened property damage* was admitted by the allegations and admissions of the pleadings. Reference is made to the decree of the District Court, from which appeal was taken (Record p. 28), wherein it is recited that the Court's finding was made "after a thorough examination of the pleadings, including the answer and the admissions therein." And, also, to the opinion of the Circuit Court of Appeals here challenged wherein it is stated as foundation of the factual basis of the opinion (Record p. 40), "it appears from the allegations and admissions in the pleadings." The following excerpts from the answer of the petitioners in the District Court clearly demonstrate that all allegations of property damage, or necessity for multiplicity of suits were traversed:

Page 21, paragraph 2:

(Defendants) "Deny that the defendants contemplate and threaten to wrongfully and unlawfully so administer the said statute as to impose on the plaintiff illegal financial burdens and exactions, and occasion a disruption and disorganization of part of plaintiff's passenger train operations."

Page 25, paragraph IX:

"Answering the allegations of paragraph IX of the petition, deny that the defendants under a (purposefully), arbitrary, wrongful and unlawful construction and administration of the above quoted statute are threatening to bring criminal proceedings against the plaintiff railroad company because of said alleged violations of said statute, or to take other steps to impose upon plaintiff, or upon interstate commerce, any illegal burdens and exactions which would result from a wrongful and unlawful construction and administration of said statute.

Defendants aver that the Nebraska State Railway Commission has no intention of proceeding any further in connection with any of the matters in the premises set forth, and that none of the defendant law enforcement officers, aforesaid, have any intention to, or will act in any way to harass, coerce, impede or in any wise hinder the plaintiff in the operation of its railroad trains by reason of any alleged violation of said statute, save and except under the circumstances and conditions following, to-wit:

(fol. 35) *The Attorney General of the State has under consideration the proper construction of said statute, and if it should be determined by him that it is necessary and proper so to do in order to obtain a judicial determination of the exact meaning thereof, he may cause a test suit to be instituted in the courts of the state for some one alleged violation thereof, and cause such test suit to be prosecuted to effect so that a determination of the Supreme Court of Nebraska may be*

had thereon; that it is not the object and purpose of the defendant Attorney General, nor will he seek by means of such test suit or action, to (inflect) financial penalties or loss upon the defendant prior to such time as it has been finally determined by orderly procedure in the courts of the state that the plaintiff is in fact committing acts which are violative of said statute, but that the action of the Attorney General, when taken, and of the law enforcement officers who may be called upon to assist him, will be taken solely in the interests of justice and so conducted as to cause a minimum of financial expense to the plaintiff until such final determination shall be had."

So far from disclosing threatened damage to property or threatened multiplicity of suits, or any other ground upon which equity jurisdiction could attach, it is clearly disclosed by the pleadings *that there is not and never was a threat to invade respondent's property rights, nor a threat of multiplicity of suits by petitioners against respondent, nor any ground for the interposition of equity.* Under these circumstances there was no factual basis for any decree affording injunctive relief to the respondent.

Under these circumstances it is quite apparent that the District Court erred in entering judgment on the pleadings.

Judgment on the pleadings cannot be rendered for plaintiff where the allegations of the bill are sufficiently controverted or where the answer sets up a good defense.

49 C. J. 671.

Williams v. *Green*, 23 Fed. (2d) 796

Walker v. *Traylor Engineering, etc. Co.*, 12 Fed. (2d) 382.

Drew v. *U. S. Shipping Board Emergency Fleet Corp.*, 275 Fed. 620.

The District Court doubtless fell into this error by reason

of the fact that it had already passed upon a motion to dismiss in which it very properly assumed the facts alleged in the bill or petition in equity to be true. (Record pp. 16-19.)

In its decree (Record pp. 28-29), it erroneously assumed these same facts to be admitted by the answer and the Circuit Court of Appeals, as above quoted, fell into the same error.

It would seem unnecessary to argue at length that there must be a factual basis for equitable interposition before a federal District Court may interfere by injunction with the enforcement of state criminal statutes.

There have been a number of cases decided in the various Circuit Courts of Appeal wherein it has been held that a law enforcement officer may not be enjoined from enforcing a valid state enactment, even though he may be misconstruing the law.

Herkness v. *Irion*, 11 Fed. (2d) 386.

Amalgamated O. G. Corp. v. *City and County of San Francisco*, 263 Fed. 617.

Arbuckle v. *Blackburn*, 113 Fed. 616 (C. C. A. 6th Cir.), 191 U. S. 405.

Smith v. *Tillitson*, 29 Fed. (2d) 535 (C. C. A. 8th Cir.).

These cases were distinguished by the District Court (Record pp. 18 and 19) and the Circuit Court of Appeals (Record pp. 45, 46), on the authority of *Greene* v. *Louisville and I. R. Co.*, 244 U. S. 499, and *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, and it was considered that "a valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual."

Greene v. *Louisville and I. R. Co.*, 244 U. S. 499, 507.

The position of the Attorney General of Nebraska as the chief law officer of the state, with direction and control over the other law enforcement officers, will not, we think, be controverted. The sections of the Compiled Statutes of Nebraska for 1929, which define the power and authority of the State Attorney General in the administration of criminal laws of the state, are set out in the margin.*

Again we call attention to the fact that the answer in the District Court alleged:

> "Defendants aver * * * that none of the defendant law enforcement officers, aforesaid, have any intention to, or will act in any way to harass, coerce, impede or in any wise hinder the plaintiff in the operation if its railroad trains by reason of any alleged violation of said statute, save and except under the circumstances and conditions following, to-wit:
>
> (fol. 35) The Attorney General of the State has under consideration the proper construction of said stat-

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* Section 84-201 Compiled Statutes of Nebraska for 1929, is as follows:

> "There is hereby constituted an executive department to be known as the department of justice and the attorney-general shall be the head of this department."

Section 84-203 is as follows:

> "The attorney-general is hereby authorized to appear for the state and prosecute and defend in any court or before any officer, board, or tribunal, any cause or matter, civil or criminal, in which the state may be a party or interest * * *."

Section 84-204 is as follows:

> "The attorney-general and the department of justice shall have the same powers and prerogatives in each of the several counties of the state as the county attorneys have in their respective counties."

ute, and if it should be determined by him that it is necessary and proper so to do in order to obtain a judicial determination of the exact meaning thereof, he may cause a test suit to be instituted in the courts of the state for some one alleged violation thereof, and cause such test suit to be prosecuted to effect so that a determination of the Supreme Court of Nebraska may be had thereon; that it is not the object and purpose of the defendant Attorney General, nor will he seek by means of such test suit or action, to (inflect) financial penalties or loss upon the defendant prior to such time as it has been finally determined by orderly procedure in the courts of the state that the plaintiff is in fact committing acts which are violative of said statute, but that the action of the Attorney General, when taken, and of the law enforcement officers who may be called upon to assist him, will be taken solely in the interests of justice and so conducted as to cause a minimum of financial expense to the plaintiff until such final determination shall be had."

On oral argument before the Circuit Court of Appeals it was contended by the respondent that the intention of the law enforcement officers as to prosecution for penalties, was immaterial; that the statute in effect constituted a standing threat of invasion of property rights against which the complainant was entitled to be protected. The following is taken from a document entitled "Additional Authorities", filed by respondent in the Circuit Court of Appeals on the day of hearing, in support of this contention:

"*Atchison, Topeka & Santa Fe Ry. Co.* v. *La Prade.*, 2 F. Supp. 855.

This suit was instituted in the District Court to enjoin the Attorney General of the State of Arizona from enforcing what is styled the 'Arizona Train Limit Bill.' This Bill prohibited any railroad in Arizona from operating passenger trains consisting of more than seventy cars. The statute involved a penalty of not less

than $100.00 and not more than $1,000.00 for each offense.

In the opinion the Court said:

"* * * The Arizona statute involved herein imposes the duty on the Attorney General of the state, and him alone, to enforce the Train Limit Law. It is a continuing statutory duty devolving upon each succeeding Attorney General of the state. This duty is imposed upon Mr. La Prade as it was upon Mr. Peterson, and will continue to be inherited by each succeeding Attorney General as long as the act remains upon the statute books of Arizona. The plaintiff's cause of action, in so far as the same may depend upon the threatened injury, does not rest upon any expression of intent on the part of the defendant other than his oath of office, as the threat is contained in the language of the statute. When the defendant La Prade took the oath of office, it became his sworn duty to enforce the law. As long as there is an Attorney General in the state, the threat of prosecution is always present, and the injury, if any, resulting therefrom is always impending. *Commonwealth of Pennsylvania* v. *State of West Virginia (State of Ohio* v. *State of West Virginia)*, 262 U. S. 553, 43 S. Ct. 658, 57 L. Ed. 1117, 32 A. L. R. 300.'"

The holding in *Atchison, Topeka & Santa Fe Ry. Co.* v. *La Prade*, supra, was, however, set aside by this Court in the case of *Ex Parte La Prade*, 289 U. S. 444. The Court in its opinion, page 458, states:

"As shown above, the purpose of the suits was to prevent a wrong about to be committed by defendant acting outside, and in abuse of the powers of, his office. The wrongs threatened or committed by him constitute no ground for injunction against petitioner. Plaintiffs did not allege that petitioner threatened or intended to do anything for the enforcement of the statute. The mere declaration of the statute that suits for recovery of penalties shall be brought by the attorney general

is not sufficient. Petitioner might hold, as plaintiffs maintain, that the statute is unconstitutional and that, having regard to his official oath, he rightly may refrain from effort to enforce it. * * *.'"

There was previously decided in the Circuit Court of Appeals, Eighth Circuit, a case which presents a somewhat analogous state of facts, to-wit: *Smith* v. *Tillitson*, 29 Fed. (2d) 535 (C. C. A. 8th Cir.). The Circuit Court of Appeals would have done well to have considered and followed the reasoning of that decision. In that case an injunction was sought to restrain the Attorney General and the law enforcement officers of ten counties and fifteen cities of the State of Kansas from seizing, confiscating, or in any wise interfering with the operation of complainant's vending machines. Kansas had enacted a law, constituting the operation of any machine or mechanism for gambling purposes, a misdemeanor. Complainant urged that his vending machines were not within the condemnation of the statute, and that the proposed enforcement thereof, by the defendant officers by seizure of his machines, would work irreparable injury to complainant's business in violation of the Constitution of the United States. The lower federal Court issued an interlocutory injunction from which an appeal was taken. The Circuit Court of Appeals, Eighth Circuit, reversed and remanded with directions to dismiss same, saying:

"The bill in this case is somewhat anomalous. It does not attack the validity of any Kansas statute against gaming or gambling devises. It does not plead the threat or imminence of arrest or prosecution, but asserts that the law officers of the state are about to seize and hold the property of complainant, presumably under the provisions of section 21-919, quoted above. That section provides for the arrest of the person or persons operating the gambling devices of which it

> treats, and therefore contemplates prosecution, and forms a part of the established criminal procedure of the state. It is undoubtedly true that, where state officers attempt to enforce an unconstitutional law, or exceed their authority in an attempt to enforce a valid law, where property rights will be destroyed, or seriously impaired, unlawful interference by criminal proceedings may be reached and controlled by a court of equity."

After citing the cases of *Arbuckle* v. *Blackburn*, 113 Fed. 616, 65 L. R. A. 864; *Consumers Co.* v. *Austin*, 238 Fed. 616; *Hoffman Brewing Co.* v. *McElligott*, 259 Fed. 525, and *Herkness* v. *Irion*, 11 Fed. (2d) 386, the court concluded:

> "The order of the trial court in terms enjoins the officers of the state from seizing, or in any way interfering with the operation of complainant's vending machines at any place within the state of Kansas. It is true that the order is a temporary one; but surely it cannot be supposed that upon final hearing the court would subvert the administration of the criminal law, and deny the right of trial by jury, by substituting a court of equity to inquire into the commission of offenses where it would have no jurisdiction to punish the parties if found guilty. In view of the debatable character of appellee's device, it is not to be anticipated that the defendants, or any of them, will resort to drastic measures, resulting in unnecessary injury to appellee's property and business in advance of determination of the question at issue in the courts of the state. The case is clearly one for their exclusive jurisdiction."

The only difference which can be discerned between the Tillitson case and the instant case, is that in the Tillitson case the Circuit Court of Appeals assumed that the law enforcement officers of Kansas would not act arbitrarily in seeking a construction of their gambling statute. That is, they would not resort to drastic measures, resulting in un-

necessary injury to property and business in advance of the determination of the question at issue in the Courts of the state.

In the instant case no such assumption was necessary. It is expressly pleaded that there will be no drastic action, nor attempt to impose heavy penalties, but that the only action contemplated is the possible bringing of a test case, which will be done solely in the interests of justice and so conducted as to cause a minimum of financial expense to the respondent.

We have been at some pains to conjecture on what possible theory this utter lack of factual basis for equity jurisdiction could have been overlooked by the Circuit Court of Appeals in its decision and utterly ignored when specifically challenged to its attention in the petition for rehearing. The point was included in the "Points to be Argued", set out in the Brief of Appellants below, and as pointed out in the petition for rehearing, was argued orally before the Circuit Court of Appeals. One of the cases relied on by adverse counsel at the argument has already been examined in this brief. There can be no question but what this point was challenged to the attention of the Circuit Court of Appeals. The only possible excuse for not considering the same, which occurs to our mind, is that while the question inhered as a necessary element in a proper consideration of the jurisdiction of the federal Court, it was not specifically stated as one of the points upon which the defendant intended to rely upon appeal (Record p. 33). The points include the following:

> "The statute is a valid enactment, not in conflict with any provision either of the state or the federal constitution, and equity does not afford jurisdiction to enjoin a threatened criminal prosecution, based on a valid

statute, because of an alleged misconstruction of such statute by administrative state officers." (Record p. 34)

We think this broad enough to permit the discussion, not only of the general rule, but of the exceptions thereto, and when and under what circumstances equity may assume jurisdiction to enjoin criminal proceedings under a valid statute.

It must, however, be kept in mind that this appeal was taken under the new rules of Civil Procedure for the District Courts of the United States, effective September 1, 1938. Reference to Rule 73, subdivision (b) discloses that no assignments of error need be filed in the District Court. Reference is made to the annotation on page 111 of the Annotated Rules as published by the West Publishing Company:

> "Note to Subdivision (b). No assignments of error need be filed in the district court, but see Rule 75 (d) (Statement of Points) for the service by the appellant of a statement of the points on which he intends to rely on the appeal. Compare the state provisions cited above. The provision regarding assignments of error contained in U. S. C., Title 28, sec. 862 (Removal of causes by former writ of error) as modified by U. S. C. Title 28, sec. 861a (Writ of error abolished; substitution of appeal) and sec. 861b (Statutes governing writs of error to apply to appeals) are superseded in so far as no assignments of error are required to be filed in the district court. Compare Rule 9 of the Supreme Court of the United States and the rules of the various circuit courts of appeals."

It is true that under Rule 75, subdivision (d) it is provided:

> "(d) STATEMENT OF POINTS. If the appellant does not designate for inclusion the complete record

> and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal."

But in this case no part of the proceedings or evidence were omitted and it would appear that it was necessary to file a statement of the points relied upon.

The rules of the United States Circuit Court of Appeals for the Eighth Circuit formerly contained as Rule 11 a provision for the assignment of errors on appeal to that Court, but this appears to have been omitted in their rules conforming to the new federal rules of civil procedure, effective September 16, 1938.

In any event, no excuse based on any such technicality was advanced by the Circuit Court of Appeals as ground for failure to consider this point. Further, it must be considered that here is a plain error going to the jurisdiction of the trial Court, which, even if not fully stated in the assignments of error (if such assignments are necessary) should not be deemed to be waived. In Hughes, Federal Practice, Jurisdiction and Procedure, vol. 8, page 254, paragraph 5743, it is said:

> "But an objection to the jurisdiction of the trial court is one that cannot be waived, and may be raised at any time, or considered by the appellate court on its own motion; hence it need not be presented by an assignment of error."

CONCLUSION

In conclusion we respectfully represent to the Court that an important question of general law has been wrongly decided; that an important federal question, to-wit: the jurisdiction of the federal District Court in an action against the chief law enforcement officer of the state has been wrongly decided and, in general, that the decision departs from the

accepted and usual course of judicial proceedings so as to require the exercise of the supervisory powers of this Court. We respectfully submit that this Court should not sanction the employment of the strong arm of injunction to prevent the State Attorney General from bringing a test action to obtain a construction of a valid criminal statute of the state, where no property damage is involved and no multiplicity of suits is threatened.

Respectfully submitted

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IN THE

Supreme Court of the United States

October Term, 1939

No. [redacted] 72

HENRY J. BEAL, County Attorney of Douglas County, Nebraska, Et Al.,

Petitioners,

vs.

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA,

Respondent.

RESPONDENT'S BRIEF IN RESISTANCE TO APPLICATION OF PETITIONERS FOR WRIT OF CERTIORARI

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INDEX

	Pages
NATURE OF THE CASE	2
ANALYSIS OF PLEADINGS	4
NATURE OF THE CASE (Continued)	16
NATURE AND PURPOSES OF CERTIORARI JURISDICTION	25
APPELLANT'S SPECIFICATIONS OF ERROR OR REASONS FOR REVIEW (Answer to)	30
RULES OF LAW	41
CONCLUSION	46

TABLE OF CASES CITED

American Construction Co. v. Jacksonville & T. & K. W. R. Co., 148 U. S. 372, 383, 37 L. Ed. 486.	28
American Steel & Wire Co. v. Davis, 261 F. 800	42
Boynton, Attorney General of Kansas, et al., v. Ellis, 57 F. (2d) 665 (C. C. A. 10, 1932)	41
Chambers v. Bachtel, 55 F. (2d) 851 (C. C. A. 5, 1932)	41
Davies, Sheriff, et al., v. Mills Novelty Co., 70 F. (2d) 424 (C. C. A. 8, 1934)	41
Dearborn Publishing Co. v. Fitzgerald, 271 F. 479 (D. C. N. D., Ohio, 1921)	41
Federal Power Commission v. Pacific Power & Light Co., 33 L. Ed. 664	26
Forsyth v. Hammond, 166 U. S. 506, 514, 515, 41 L. Ed. 1095	28
Greene v. Louisville & I. R. Co., 244 U. S. 499	38, 41
Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251, 258, 60 L. Ed. 629	28
Iowa & Des Moines Natl. Bank v. Bennett, 284 U. S. 239	43, 44
Magnum Import Co. v. DeSpoturno Coty, 262 U. S. 159, 163, 67 L. Ed. 922	27

INDEX—Continued

TABLE OF CASES CITED—Continued

	Pages
Mahoney, et al., v. Carolene Prod. Co., 2 F. (2d) 366 (C. C. A. 1, 1924)	42
Missouri Pacific R. R. Co. v. Norwood, 42 F. (2d) 765	33, 42
Morgan v. Nolan, 3 F. Supp. 143 (D. C. S. D., Ind., 1933)	41
National Remedy Co. v. Hyde, 50 F. (2d) 1066	43
Panama v. Ryan, 293 U. S. 388	43
Philadelphia Co. v. Stimson, 223 U. S. 605	38, 41
Royal Baking Powder Co. v. Emerson, 270 F. 431 (C. C. A. 8, 1920)	41, 43
Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 208, 82 L. Ed. 1290	28
Smith v. Tillitson, 29 F. (2d) 535 (C. C. A. 8, 1928)	41
Sterling v. Constantin, 287 U. S. 378, 77 L. Ed. 375.	43
Stuart, et al., v. Utility Inv. Corporation, 78 F. (2d) 279 (C. C. A. 3, 1935)	42
Truax v. Raich, 239 U. S. 32, 60 L. Ed. 131	32, 42
Weyman-Bruton Co. v. Ladd, 231 F. 898 (C. C. A. 8, 1916)	41
Yu Cong Eng v. Trinidad, 271 U. S. 500, 507	42

STATUTES AND COURT RULES CITED

C. S. Nebr., 1929, Sec. 74-519	20
C. S. Nebr., 1929, Sec. 74-522	20
Rules of Supreme Court, 38, 5	26

TEXTBOOKS

American Jurisprudence, Vol. 16, Sec. 24, p. 296	36
Borchard, Declaratory Judgments, p. 560	37

IN THE

Supreme Court of the United States

October Term, 1939

No. 995

HENRY J. BEAL, County Attorney of Douglas County, Nebraska, Et Al.,

Petitioners,

vs.

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA,

Respondent.

RESPONDENT'S BRIEF IN RESISTANCE TO APPLICATION OF PETITIONERS FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Respondent respectfully shows:

Petitioners, Henry J. Beal, and other enforcement officers, appearing by the Attorney General of the State of Nebraska, petitioned for writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, in the matter of Henry J. Beal, County Attorney of Douglas County, Nebraska, et al., Appellants, vs. Missouri Pacific Railroad Corporation in Nebraska, Appellee, No.

11,465, decided January 18, 1940; rehearing application denied February 12, 1940.

The case was originally heard by the Hon. James A. Donohoe, District Judge, and a decree was entered in favor of the Respondent herein. An appeal was had to the Circuit Court of Appeals, and the case was heard before Stone, Gardner and Sanborn, Circuit Judges. The decision of the District Court was affirmed.

—o—o—

NATURE OF THE CASE

This was a suit in equity, brought by the Missouri Pacific Railroad in Nebraska, a Delaware corporation, against the petitioners, including the Attorney General of the State of Nebraska, and certain other law enforcing officers of that State, to enjoin them from the enforcement of the Nebraska Full Train Crew Law, as wrongfully construed by such officers so as to require the discharge of colored brakemen long employed by respondent.

Defendants below moved to dismiss the suit for want of equity. This motion was denied, and Judge Donohoe's opinion, in overruling said motion, entered June 30, 1936, appears on page 16 of the printed record.

Thereafter answer was filed, which, for the most part, admitted all of the allegations of fact contained in the petition. The petition was very voluminous and purposely set out the facts in great detail.

On December 2, 1938, the case came on for hearing, and the District Court, upon a thorough examination of

the pleadings, including the answer and the admissions contained in the answer, found in favor of the respondent. The Court found that there was a misconstruction or mis-interpretation of the statute of the State of Nebraska by the defendant law enforcement officers and enjoined its enforcement as unlawfully and erroneously construed.

As we will hereinafter explain, the case involved an interpretation of the Full Train Crew Law, a law requiring certain crews upon passenger trains operated in the State of Nebraska.

The Court found from the pleadings that there was a compliance with the statute in controversy by the respondent and that petitioners claim that respondent operated its trains in violation of the statute was the result of an unlawful construction and interpretation of the statute by the defendants or petitioners.

The Court likewise found that there was nothing further to be tried upon the merits. The Court thereupon entered an injunction, as prayed for by the respondent. This was entered on the 2nd day of December, 1938.

There was an attempt on the part of the plaintiff and defendants below to set forth in the pleadings all of the facts. The petition filed alleged in great detail the relevant facts, and the answer of the defendants admitted, for the most part, the facts alleged. An examination of the pleadings will show that there was no necessity for the taking of any testimony—all of the necessary facts were agreed upon in the pleadings. Therefore, it becomes necessary, in a statement of the nature of the case, to analyze the pleadings.

The Nebraska Statute involved is known as the "Full Train Crew Law." Section 1 (74-519, Comp. St. of Neb., 1929) provides the crew requirements for passenger trains in the State of Nebraska, and provides that a passenger train having more than five cars should have a crew consisting of not less than one engineer, one fireman, one conductor, one brakeman, and one flagman. If the train consists of less than five cars, the crew must be one engineer, one fireman, one conductor, and one brakeman or flagman. This statute was originally passed in the year 1909 and is set out on page 2 of petitioner's brief. Section 2, set out fully on the same page of petitioner's brief, provides penalties for violation of this statute. The penalties provided are not less than $100.00 nor more than $1,000.00 for each offense. (Each movement of the train in violation of the statute is an offense.)

The statute further provides as a penalty that the company and its officers should be liable for any damage caused by violation of the provisions of the Act.

—o—o—

ANALYSIS OF PLEADINGS

It is alleged in plaintiff's petition (Par. VI, pp. 8 and 9, Rec.), and is admitted in the answer of the defendants, that the Missouri Pacific passenger trains 109 and 110 operate with a crew consisting of one man qualified to perform and performing the duties of engineer, one man qualified to perform and performing the duties of fireman, one man qualified to perform and performing the duties of conductor, one man qualified to perform and performing the duties of a flagman, one man qualified to perform and performing the duties of brakesman desig-

nated "brakeman and porter" (Par. VI, Ans. pp. 22 and 23, Pr. Rec.).

It is alleged in the petition and admitted, that the duties of "brakeman and porter"—a colored man— consist, substantively, in assisting the conductor in receiving and discharging passengers, and under the direction of the conductor, assisting in the directing of the train operations generally; that his station is in or about the train, particularly in the middle of the train, unless particular duties call him elsewhere (Par. VI, Ans. pp. 22 and 23, Pr. Rec.).

It is admitted that when his brakeman duties permit, he does porter work necessary, but that this does not include cleaning of the cars (Par. VI, Ans. p. 23, Pr. Rec.).

It is alleged in the petition and admitted in the answer that the colored men designated as "brakeman and porter" pass all examinations, mental and physical, and fulfill all other requirements set up for the qualification of brakemen and flagmen (Par. VI, Ans. p. 23, Pr. Rec.).

It is admitted that the original proceedings to enforce this Full Crew Bill were instituted by J. F. Moredick, an official of the Brotherhood of Railway Trainmen, and it is alleged in the petition, and admitted in the answer, that in his testimony before the Railway Commission, in the hearings before that body to compel the railroad to discharge the colored men and hire white men as brakemen, Mr. Moredick testified as follows (Par. VII, p. 10, Pr. Rec.; Par. VII Ans. p. 24, Pr. Rec.):

> "I don't know, Mr. Kirk, that this is particularly material, but I just wanted to bring it to the attention of the Commission—the fact that the B. of R. T. in

our general agreements committee in St. Louis in 1921 asked the Missouri Pacific Railroad to place the porter-brakemen on the B. of R. T. Seniority list, and I am going to tell the Commission, because it isn't a matter that is secret, that the principal cause for this was to not only let the white man get some of these good jobs, but to get rid of the colored men. I think Mr. Kirk will agree."

After the passage of the bill, J. F. Moredick, an officer of the Brotherhood of Railway Trainmen, an organization of white railroad brakemen, filed a complaint before the Nebraska State Railway Commission, charging the Missouri Pacific with operating its passenger train Nos. 109 and 110 in violation of the statute, in that the requirement of one brakeman was not complied with, as the trainman who did the brakeman's work was referred to by another designation. On June 2, 1928, the complaint was dismissed. On January 20, 1931, Mr. Moredick again filed a complaint before the Nebraska State Railway Commission, again alleging that for the reason above indicated, the Missouri Pacific operated its trains 109 and 110 in violation of the statute. Upon a hearing, the evidence being substantially the same, the Commission, on March 1, 1932, again dismissed the complaint. In April, 1932, Mr. Moredick sought a rehearing. A rehearing was granted. No additional evidence was offered by Mr. Moredick. At that hearing, it is alleged in the petition, evidence was offered that the "brakeman and porter" and each of the members of the train crews were qualified in every way to discharge the duties of their respective positions, the brakeman and porter completely performing the duties of the brakeman, and when the brakeman's duties permitted, doing some porter work. These facts are all admitted in the answer of the defendant filed in this case (Par. IV, V and VI, pp. 21 to 23, Pr. Rec.).

The opinion of the Commission, as alleged in the petition, and its order, are as follows:

"Opinion.

"After investigation of all the testimony, the Commission is of the opinion and so finds that so far as the safety of the traveling public is concerned, the trains in question, Nos. 109 and 110, are adequately manned, and that said trains, Nos. 109 and 110, being trains of more than five cars, are being operated by five employees qualified to perform and performing the duties of one engineer, one fireman, one conductor, one brakeman, and one flagman. The Commission finds that each one of the five railroad employees of said train performs one of the duties required by said Section 74-519, and that each employee in his particular work has passed the regular examination for said work and is fully qualified to perform the same. The Commissions' attention was more particularly called to the colored trainman, performing the duties of brakeman and porter. Careful investigation discloses that although this man's race and color disqualify him from holding the position of brakeman, he is capable of performing all of these duties and has passed the same examinations required of one who bears the title of brakeman. The Commission is therefore of the opinion and so finds that so far as public safety is concerned, the trains in question are adequately manned. The Commission is, however, of the opinion that so far as a literal interpretation of the statutes is concerned, trains Nos. 109 and 110 are not operated by employees bearing the titles set forth in Section 74-519, which makes the defendant company liable for criminal prosecution under Section 74-522, C. S. of 1929.

"Therefore, in view of the fact that this Commission does not have any criminal jurisdiction and in view of the fact that in the Commission's opinion safety for and service (fol. 9) to the public are ade-

quately cared for by the crew as we find it to be constituted, the Commission finds that the proper prosecuting authorities should be advised as to the facts determined by the Commission so that prosecution may result if, in the opinion of said prosecuting authorities, a misdemeanor has been committed.

"Order.

"It Is Therefore Ordered by the Nebraska State Railway Commission that the defendant comply fully with Section 74-519, C. S. of 1929, and that the Attorney General of the State of Nebraska be advised that on the 20th day of January, 1931, and at other times subsequent thereto, the Missouri Pacific Railroad Corporation in Nebraska, did operate over its road in Nebraska, outside of the yard limits, a passenger train carrying passengers, whose regular equipment consisted of more than five cars with a crew consisting of one man qualified to perform and performing the duties of engineer, one man qualified to perform and performing the duties of fireman, one man qualified to perform and performing the duties of conductor, one man qualified to perform and performing the duties of brakeman, and one man qualified to perform and performing the duties of flagman, but that the man qualified to perform the duties of brakeman was not designated and known as brakeman but was designated and known as trainman.

"It Is Further Ordered by the Nebraska State Railway Commission that the records and files in this case and of the Commission be and they hereby are made available to the Attorney General of the State of Nebraska for his use in prosecuting the Missouri Pacific Railroad Corporation in (fol. 10) Nebraska for the violation of any criminal statute which he may feel this act constitutes."

That the above was the opinion and the order was admitted in the answer of the defendants (see pp. 4 to 11 and pp. 21 to 25, Pr. Rec.).

It is alleged in the petition and admitted in the answer that under the plaintiff's contract with the colored brakemen, the wage scale is $120.00 per month. It is further alleged and admitted that if the plaintiff was required to hire white brakemen in place of colored brakemen, the wage scale under the contract with the B. of R. T. would be approximately $200.00 per month, and the plaintiff alleges, in Paragraph VIII, and the defendant's answer, in Paragraph VIII, admits, that the substitution of white brakemen in place of colored brakemen would result in increasing plaintiff's expenses in the operation of its passenger trains under consideration, in Nebraska, to the extent of approximately $6,700.00 per year (p. 25, Pr. Rec.).

Thus it appears that the statute requires trains of more than five cars to have, besides the engine crew, one conductor, one brakeman and one flagman, and it appears without dispute that the Company, besides the engine crew, has one conductor, one "brakeman-porter" and one flagman. It appears that the man designated as a "brakeman and porter" is a colored man; that he takes exactly the same examination, physical and mental, as do the white brakemen and flagmen, and that he is just as well qualified as a white brakeman or flagman. It is admitted by defendants that the substitution of a white brakeman for a colored brakeman would cost the Company approximately $6,700.00 a year.

It is admitted in the pleadings that the Nebraska State Railway Commission has found, after a hearing, that this colored brakeman-porter was capable of performing all of the duties of a brakeman and flagman and that he had passed the same examinations required of one who bears the title of brakeman.

The Nebraska State Railway Commission found, after a hearing, *that so far as public safety is concerned, the trains in question are adequately manned.* The Commission, however, held that—

> "So far as a literal interpretation of the statute is concerned, trains 109 and 110 (which employ the brakeman and porter as one of the crew) are not operated by employees bearing the titles set forth in Sec. 74-519, which makes the defendant company (Missouri Pacific) liable for criminal prosecution under Sec. 74-522, C. S. Neb., 1929."

It will be noted that the statute does not require that the crew be designated with any particular title, but only defines what the crew shall consist of.

It was further admitted in the pleadings that the Nebraska State Railway Commission found as follows:

> "Therefore in view of the fact that this Commission does not have any criminal jurisdiction and in view of the fact that in the Commission's opinion safety for and service to the public are adequately cared for by the crew as we find it to be constituted, The Commission finds that the proper prosecuting authorities should be advised as to the facts determined by the Commission so that prosecution may result if, in the opinion of said prosecuting authorities a misdemeanor has been committed." (Opinion and Order, pp. 6, 7 and 21, Pr. Rec.)

The Commission then in its order found that the Company's trains 109 and 110 operated with a crew consisting, besides the engine crew, of one man qualified to perform and performing the duties of conductor, one man qualified to perform and performing the duties of brakeman and one man qualified to perform and performing the duties

of flagman, but that the man qualified to perform and performing the duties of brakeman *was not designated and known as a brakeman, but was designated and known as trainman* (pp. 5, 6, 7 and 21, Pr. Rec.).

The Commission further ordered that its files be available to the Attorney General for his use in prosecuting the Missouri Pacific Railroad Company for the violation of any criminal statute which he may file, which the Company's acts warranted.

It thus appears that after three hearings before the Railway Commission the matter was referred to the Attorney General.

The plaintiff Railroad Company thereafter brought this suit. The suit was brought in October, 1932. The defendants filed a motion to dismiss, in November, 1933. This was called up for hearing in the April Term, 1936, and on June 30, 1936, after full argument and after the matter had been briefed by both parties and submitted to Judge Donohoe, he overruled the defendant's motion to dismiss.

Judge Donohoe's opinion is set out on page 16 of the printed record.

The defendants, in July, 1937, filed their answer. This appears on page 20 of the printed record.

Defendants in their answer admit the allegations of plaintiff's petition, having to do with the proceedings before the Nebraska State Railway Commission. They admit the allegations of diversity of citizenship. They admit that the defendants are law enforcement officers of

the State of Nebraska and that a certain number of the defendants are members of the Nebraska State Railway Commission. They further admit as follows; we quote the following paragraphs from the answer (p. 20, Pr. Rec.):

"VI.

"Admit that the plaintiff in the conduct of its passenger trains Nos. 109 and 110 operated and operate same with a crew consisting of one man qualified to perform and performing the duties of engineer, one man qualified and performing the duties of fireman, one man qualified to perform and performing the duties of conductor, one man qualified to perform and performing the duties of 'brakeman and porter,' but deny that such operation fully meets all requirements and intendments of said statute.

"Admit that said trainmen were and are severally designated as engineer, fireman, conductor, flagman and 'brakeman and porter,' but deny that said statute makes no requirement whatsoever as to how and in what manner the railroads shall entitle their employees on the trains.

"Admit that in addition a qualified baggageman-expressman handles baggage and express.

"Admit that the trainmen performing the duties of 'brakeman and porter' on said trains Nos. 109 and 110 were and are colored men.

"Admit that said colored men pass all examinations, mental and physical, and fulfill all other requirements set up for the qualification of 'brakeman' and 'flagman.'

"Admit that the duties of a 'brakeman and porter' consist substantively of assisting the conductor in the receiving and discharging of passengers, and, under the direction (fol. 31) of the conductor assisting the the protecting of the train operation generally,

the 'brakeman and porter's' place in and about the train being at or near the middle of the train, unless particular duties call him elsewhere.

"Admit that when the 'brakeman and porter's' duties permit, he does whatever porter work may be necessary, and admit that this does not include cleaning the cars, but as to whether or not such porter work is negligible in volume these defendants have no knowledge, and, therefore, deny that the same is negligible."

"VII.

"Answering the allegations of paragraph VII of the petition, defendants admit that the colored men doing the brakemen's work on the passenger trains Nos. 109 and 110 as brakemen take all of the required mental and physical examinations to qualify as brakemen and perform (satisfactorily) all of the brakeman's duties, but as to whether or not the plaintiff refrains from designating the said colored men as brakemen by reason of any contract with the Brotherhood of Railroad Trainmen, as in the petition set out, the defendants have no knowledge and, therefore, deny the same.

"Admit that the Brotherhood of Railroad Trainmen, through its then official representative J. F. Moredick, cause the filing of the said complaints before the Nebraska State Railway Commission, but aver that they have no knowledge of the purpose of said Brotherhood or of said complainant in the filing of said complaint and, therefore, deny that the purpose of said complaint was not to seek any improvement in the train service of the plaintiff's railroad company, and further deny that it was the purpose of said complaint, through a purposeful, arbitrary, wrongful (fol. 32) and unlawful interpretation of and administration of said statute to so harass and coerce plaintiff as to force from their positions the colored trainmen.

"Defendants admit that complainant Moredick gave the testimony set forth in said paragraph before the Nebraska State Railway Commission, and state that they have no knowledge on the subject, and, therefore, deny all and singular the allegations of the plaintiff that the object of the complaints filed by the said J. F. Moredick was not to better the train service of the plaintiff company, or to advantage in any way the people of Nebraska, but through an arbitrary, unlawful and illegal construction of said statute to obtain in some tribunal a finding that as these colored men worked under the designation on their employer's records of 'brakeman and porter' instead of under the literal designation of 'brakeman,' the statutory requirement of a 'brakeman' in a passenger train crew would not be complied with, notwithstanding that the colored men passed every examination, mental and physical, required of brakemen, and discharged the duties of the brakemen to the entire satisfaction of the plaintiff railroad company, their employer, and to the entire satisfaction of the Nebraska State Railway Commission, the regulatory body having jurisdiction over the intrastate operation of plaintiff railroad company in Nebraska.

"Defendants further aver that whatever the object and purpose of the Brotherhood of Railroad Trainmen or its then representative, J. F. Moredick, may have been at the time of the institution of said proceedings before the Nebraska State Railway Commission, the same is entirely immaterial in the instant action, for the reason that the order entered by the Nebraska State Railway Commission founded (fol. 33) upon said complaints of said J. F. Moredick had no legal effect whatsoever as aforesaid, and whatsoever action may be taken hereafter towards the enforcement of said statute will be taken under the construction thereof made by the Attorney General of the State and by the law enforcement officers thereof acting under his advice and direction, and without any regard whatsoever to any object and purpose which

may have been contemplated or entertained by said Brotherhood of Railroad Trainmen or its then representative.

"VIII.

"Answering the allegations of paragraph VII of said petition, admit that the plaintiff company's contracts with the colored brakemen call for a wage scale of approximately $120.00 each per month and admit that if plaintiff were required to hire white brakemen in place of the colored brakemen (which defendants deny for lack of knowledge to have been the objective of said Moredick and expressly deny to be the object of the defendants herein) the plaintiff's wage scale with the white brakemen would be approximately $200.00 each per month and admit that the number of brakemen and porters being seven, there would be a resulting increase in the expense to the plaintiff company in the operation of its passenger trains under consideration of approximately $6,700.00 per annum.

"Deny that this expense would be needless or an absolute waste of that amount of money, or an unlawful burden and an unjust exaction upon the plaintiff and upon interstate commerce; deny that the service being rendered by the (fol. 34) colored brakemen, as stated, are competent and satisfactory in every way to all interests other than the complainant, Moredick, and his associates, for the reason that the defendants have no knowledge in that behalf.

"Admit that the wage scale paid to the colored brakemen is according to the mutual agreement of the colored brakemen and the plaintiff company.

"Deny that an annual increased expense of $6,700 imposed on plaintiff would reflect and constitute a gross loss of at least $125,000.00.

* * * * *

"X.

"Answering the allegations of Paragraph X of the petition, the defendants admit that the penalties provided by said statute are as set forth in the petition, and that as the plaintiff company operates trains Nos. 109 and 110 into and out of Nebraska daily, making within a year's time 1,460 train movements, that at the maximum possible fine of $1,000.00 for each conviction obtained this would represent gross fines of $1,460,000.00 per year, but the defendants (fol. 36) deny that they threaten to impose any such excessive penalties, and specifically deny that they intend to or would cause successive actions for penalties to be brought against the plaintiff under said statute, but aver that, as aforesaid, they have no intention of bringing any action for penalties unless and until a test action has been brought and prosecuted to final determination, which shall effectively determine plaintiff's liability in the premises."

—o—o—

NATURE OF CASE—Continued

The District Court and the Circuit Court of Appeals found that the defendant had complied with both the letter and spirit of the Act. The respondent had a crew consisting of an engineer, a fireman, a conductor, a colored brakeman and one flagman. Because of the fact that the colored brakeman could not be a member of the union composed of white men, and because of the fact that this brakeman, when his services as brakeman were not needed as such, did a little porter work, such perhaps as raising car windows, etc.,—not, however, including the cleaning of cars,—he was designated as "Brakeman and Porter."

It is admitted by all that he took all the same tests and examinations as a brakeman; that he passed them all, and that he was a fully qualified brakeman and that he performed all of the duties of a brakeman. But he

was a colored man and it was admitted that the organization instituting the proceedings out of which this suit grew had for its purpose (according to testimony admitted to have been given) the displacement of the colored man. There was no claim that the law was unconstitutional, but the plaintiff below asserted that the enforcement officers of the State erroneously interpreted the Act and the Respondent herein contended below that if the law was enforced according to such misinterpretation and misconstruction, it would be an unconstitutional invasion of the respondents' property rights.

The Circuit Court of Appeals, after reviewing the pleadings, and especially the admissions and the answers contained below, stated—

> "Plaintiff has equipped its trains with a full crew, complying at least numerically with the provisions of the statute. It has designated one of its crew as a 'brakeman and porter', or 'brakeman-porter.' This man takes exactly the same examinations, mental and physical, required of white brakemen and flagmen, and the Nebraska State Railway Commission has determined, after a careful investigation, that 'so far as public safety is concerned, the trains in question are adequately manned,' and that 'safety for and service to the public are adequately cared for by the crew.' These employees do the work of brakemen to the entire satisfaction of the Railroad Company and to the entire satisfaction of the Nebraska State Railway Commission. The fact that they may do some porter work, if and when their duties as brakemen permit, is not, we think, material. Under the record they are primarily brakemen and perform all the duties of such an employee. The act, as we have observed, is a safety measure, and not one primarily in the interest of any particular employees or class of employees."

It thus appears, from an examination of the allegations and admissions in the pleadings, that the respondent's passenger trains Nos. 109 and 110 operate with crews consisting of one man qualified to perform and performing the duties of engineer, one man qualified to perform and performing the duties of fireman, one man qualified to perform and performing the duties of conductor, one man qualified to perform and performing the duties of flagman, and one man qualified to perform and performing the duties of brakeman, designated "brakeman and porter;" that the trainman performing the duties of "brakeman and porter" on these trains Nos. 109 and 110 were and are colored men, who have passed all examinations, mental and physical, and fulfill all other requirements set up for the qualification of brakemen and flagmen; that the duties of a brakeman and porter consist, substantially, in assisting the conductor in the receiving and discharging of passengers and, under the direction of the conductors, assisting and protecting the train operation generally. That the "brakeman and porter's" place around the train is at or near the middle of the train, unless particular duties call him elsewhere; that when his duties as brakeman permit, he does whatever porter work may be necessary: This, however, does not include the cleaning of the cars, which, of course, is done at the terminals.

These facts are all alleged in the petition and admitted in the answer.

It appeared that after the Full Crew Bill was passed, an original proceeding to enforce the Act was instituted before the Nebraska State Railway Commission, seeking to accomplish the discharge of the colored men and the employment of white men as brakemen and, as stated in

the opinion of the Circuit Court of Appeals, the individual instituting the proceedings testified, among other things [this is alleged in Par. VII of petition (p. 10 P. R.) and admitted in defendant's answer, Par. IV (p. 21 P. R.], that the principal aim of the proceedings *was to not only let the white men get some of these good jobs, but to get rid of the colored men.* This individual, a Mr. Moredick, who made this statement and who was an officer of the Brotherhood of Railway Trainmen, an organization of white railroad brakemen, filed the complaint before the Nebraska State Railway Commission, charging the respondent had operated these passenger trains 109 and 110 in violation of the statute, in that the requirement of one brakeman was not complied with, as the trainman who did the brakeman's work was referred to by any other designation, i. e., "brakeman and porter." The original proceeding was commenced before the Nebraska State Railway Commission on April 3, 1928, and was dismissed. On January 20, 1931, the same party filed a complaint with the same Railway Commission, again charging a violation of the statute. This complaint was again dismissed by the Commission, on March 1, 1932, but in April, 1932, on application of this same Mr. Moredick, a rehearing was granted by the Nebraska State Railway Commission. At the hearing evidence was offered to the effect that the "brakeman and porter," and each of the members of the train crew, were qualified in every way to discharge their duties, and that the "brakeman and porter" completely performed the duties of brakeman, and when the brakeman's duties permitted, he did some porter work.

The Nebraska State Railway Commission recited that after investigation of all the testimony it was of the opinion, and so found, that so far as the safety of the

traveling public was concerned, the trains in question, Nos. 109 and 110, were adequately manned, and were being operated by five employees qualified to perform and performing the duties of one engineer, one fireman, one conductor, one brakeman and one flagman. That each of the five employees regularly performed the duties required by the Full Train Crew Law; that each of the employees had passed the regular examinations required for said work, and was fully qualified to perform the same.

The Commission stated that its attention was more particularly called to the colored trainman performing the duties of "brakeman and porter," and the order states that "careful investigation discloses that *although this man's race and color disqualified him from holding the position of brakeman,* he is capable of performing all these duties, and has passed the same examination required of one who bears the title of 'brakeman.'" (He cannot have the title of "brakeman" unless he is a member of the Brotherhood of Railway Trainmen, the white organization.) *The Commission was therefore of the opinion, and found that so far as the public safety is concerned, the trains in question are adequately manned.* The Commission was, however, of the opinion "that so far as a literal interpretation of the statutes is concerned, Trains 109 and 110 are not operated by employees *bearing the titles set forth in Sec. 74-519,* which makes the defendant company liable for criminal prosecution under Sec. 74-522."

Therefore, the Commission referred the matter to the Attorney General "so that prosecution may result if, in the opinion of said prosecuting authorities, a misdemeanor has been committed."

The Commission further ordered that the Attorney General be advised that the Railroad Company was operating its passenger trains "with a properly qualified crew," except that "the man qualified to perform the duties of 'brakeman' was designated and known as 'trainman.'" (All of these statements in re the proceedings before the Railway Commission were admitted in defendant's answer, Par. VII, p. 23 P. R.)

The order of the Commission further provided that its files be made available to the Attorney General in prosecuting the Railroad Company for violating the statute. It appears without dispute that under respondent's contract with the colored brakeman, the wage scale is $120.00 per month, but if the respondent was required to hire white brakemen, under its contract with the Brotherhood of Railway Trainmen, the respondent would have to pay approximately $200.00 per month to the brakeman, and it is admitted in defendant's answer that the substitution of white brakemen in place of colored brakemen would increase the expense of operating the passenger trains involved to the extent of $6,700.00 per year (Par. VIII, p. 25 P. R.).

It was admitted in defendant's answer that during the year there would be 1,460 train movements of trains 109 and 110 which, at the maximum possible fine of $1,000.00, would represent gross fines of $1,460,000.00 per year (Par. X, p. 26 P. R.).

It therefore appears that the respondent had thrice been brought before the Railway Commission and had had three hearings.

The defendants filed a joint answer and, in paragraph VI (p. 22 P. R.), the defendants alleged that the

plaintiff below operated its trains with a crew consisting, in addition to the engine crew, one man qualified to perform and performing the duties of conductor, one man qualified to perform and performing the duties of "brakeman and porter," *"but deny that such operation fully meets all requirements and intendments of said statute."* The answer likewise admits that the crew consists of one man qualified to perform and performing the duties of a flagman.

In Paragraph VI of their answer (p. 23 P. R.), *the defendants below denied that the statute made no requirements as to how the plaintiff below should entitle its employees on the train.*

It is apparent from the pleadings that it was the attitude of the defendants below, notwithstanding all of the admissions in their answer, that the Missouri Pacific did not comply with the statute, but was operating its trains in violation of the statute.

No contention is made in petitioner's brief that this construction and interpretation were not erroneous, although they did so contend in the lower courts. The Circuit Court of Appeals, passing on this very proposition, said:

> "We think there has been a compliance with both the letter and spirit of the Act." (p. 43 P. R.)

Under such circumstances, the District Court found that the law enforcement officers were misconstruing the Act and that, having in mind the penalties involved, and having in mind the respondent's contract with its colored brakemen and their organization, respondent was entitled to injunctive relief against further harassment and further criminal proceedings.

As has been said before, no sustainable contention can be made that the petitioner is not fully complying with the Act, and *it is apparent that the sole purpose of all these proceedings is to attempt to compel the defendant to dismiss its colored brakemen and to employ white brakemen in their place. Of course, this was admitted in the testimony of Mr. Moredick before the State Railway Commission, which testimony is set out in the plaintiff's petition* (Par. VII, p. 9 P. R.), *and it was admitted in the defendant's answer below that such quoted testimony was given* (Par. IV, Ans. p. 21 P. R..

No claim is made that any question of public safety or service was involved.

It was likewise admitted, in Paragraph VIII of the defendant's answer (p. 25 P. R.), *that the Company's contract with its colored brakemen called for a wage of approximately $120.00 each month, and in said paragraph the defendants admit "that if plaintiff were required to hire white brakemen in place of the colored brakemen * * * the plaintiff's wage scale with the white brakemen would be approximately $200.00 each per month," and admit that the number of brakemen and porters being seven, there would be a resulting increase in the expense to the plaintiff company in the operation of its passenger trains under consideration, of approximately $6,700.00 per annum.*

The same paragraph likewise admits that the wage scale paid to the colored brakemen is according to the mutual agreement of the colored brakemen and the plaintiff company.

Thus, it was admitted in the plaintiff's answer, that on the two trains in question the respondent would be

required to pay $6,700.00 a year more than it has to pay under its contract with the colored organization. It was further admitted, in paragraph X of the defendant's answer (p. 26 P. R.), that the maximum possible fine for a year's operation of the trains in question would amount to $1,460,000.00 per year.

After the order entered by Judge Donohoe in the District Court, the petitioners herein appealed to the Circuit Court of Appeals. In appealing, the petitioners herein set forth their statement of points relied upon, and these are the only assignments of error or statement of points relied upon. These appear on pages 33 and 34 of the printed record. We quote them:

"The defendants intend to rely on appeal on the following points:

"1. The Court erred in finding that the employment of a colored brakeman, designated as a brakeman and porter, or as a brakeman porter, or as a porter, as described in the pleadings, was in compliance with the provisions of Section 54-519, Compiled Statutes of Nebraska, 1929.

"2. The Court erred in entering a decree permanently enjoining the defendants and each of them and their successors in office from instituting and prosecuting criminal or other proceedings against the plaintiff, its officers, agents and employees, or successors in title, for an alleged violation of Section 74-519, Compled Statutes of Nebraska, 1929, because of the fact that the plaintiff employs as a brakeman a properly trained or qualified colored man, or men, on its passenger train, or trains, within Nebraska, designated either as a brakeman and porter, or as a brakeman-porter, or as a porter, for the following reasons:

"[fol. 45] (a) Because it does not appear that the defendants or any of them are in error in their construction of said statute, but on the contrary that the Court erred in point of law in its construction of the statute, both in its finding and in its decree.

"(b) Because, assuming the defendants or any of them to be in error in their construction of the statute, even then, a decree of injunction should not have been entered in favor of the plaintiff and against the defendants, for that

"(1) The statute is a valid enactment, not in conflict with any provision either of the state or the federal constitution, and equity does not afford jurisdiction to enjoin a threatened criminal prosecution, based on a valid statute, because of an alleged misconstruction of such statute by administrative state officers.

"(2) To permit this suit to be entertained is to permit a suit to be prosecuted against a sovereign state by a citizen of another state in defiance of the provisions of the Eleventh Amendment to the Constitution of the United States."

The opinion of the Circuit Court of Appeals in affirming the lower Court's decision is by Gardner, Circuit Judge, and appears on page 38 of the printed record. It takes up and discusses fully all the points relied on by appellants below.

NATURE AND PURPOSES OF CERTIORARI JURISDICTION

The power to issue Certiorari rests in the exercise of sound judicial discretion by this Court.

As such, this Court has held it to be a power which should be exercised sparingly and with great caution, and

only in cases of peculiar gravity, and in order to secure uniformity of decision. The Court has frequently said that review on Certiorari is not a matter of right, and that the granting of the Writ is a highly selective process.

In his remarks before the Judiciary Committee of the Senate, on March 25, 1935, Mr. Chief Justice Hughes commented upon the Certiorari jurisdiction as follows:

> "The principles are quite obvious. Cases should not go to the Supreme Court of the United States simply because of the amount of money involved, because of the character or prominence of the parties, or because of the counsel. The question before the Supreme Court is, manifestly, the importance of the question of law involved, the importance of an authoritative determination by the tribunal invested with that very important function. We consider these various applications with respect to that, not as to the parties, not as to the amount of money involved, not as to the counsel, but as to the law. The parties have the right of appeal to the circuit courts of appeal. That satisfies the rights of individual litigants. When it comes to a further review by the Supreme Court of the United States, the higher principle of importance to the public at large is involved. * * *"

Thus, in line with the above, Mr. Justice Frankfurter, speaking to the issue, in *Federal Power Commission vs. Pacific Power & Light Company*, 83 L. Ed. 664, said:

> "The case is here on certiorari to the Circuit Court of Appeals for the Ninth Circuit, granted because of the intrinsic importance of the issue raised and of a conflict between the decision below * * * and that of the Circuit Court of Appeals for the Second Circuit. * * *"

This Court, in *Rules of the Supreme Court, Rule 38; Paragraph 5,* has issued a comprehensive statement of

the principles governing the exercise of its discretion on Certiorari, sub-paragraph (b) being the portion particularly applicable in the present case:

> "5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> * * * * *
>
> "(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

In *Magnum Import Co. v. DeSpoturno Coty*, 262 U. S. 159, 163, 67 L. ed. 922, this Court, in a certiorari case, said:

> "The question how the court should exercise this power (certiorari) next arises. The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases in-

volving questions of importance which it is in the public interest to have decided by this court of last resort. *The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court another hearing.*" (Italics ours.)

This case was cited in the recent case of *Ruhlin v. New York Life Insurance Company*, 304 U. S. 202, 208, 82 L. ed. 1290.

The rule is stated clearly and succinctly in *Forsyth v. Hammond*, 166 U. S. 506, 514, 515, 41 L. ed. 1095:

> "While this power (certiorari) is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

This Court said in *Hamilton-Brown Shoe Company v. Wolf Bros. & Co.*, 240 U. S. 251, 258, 60 L. ed. 629:

> "As has been many times declared this (certiorari) is a jurisdiction to be exercised sparingly, *and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.*" (Citing U. S. cases.)

In *American Construction Co. v. Jacksonville T. & K. W. R. Co.*, 148 U. S. 372, 383, 37 L. ed. 486, this Court said:

> "It (certiorari) has been held to be a branch of jurisdiction which should be exercised sparingly and

with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision."

It is readily apparent, from a reading of the opinion of the Circuit Court of Appeals, that that Court considered all of the points relied upon by petitioners.

We cannot understand the remark in petitioner's brief to the effect that the Circuit Court of Appeals failed to consider the matter of equity jurisdiction. A mere reading of the opinion, commencing at the bottom of page 43 of the printed record, shows that the petitioner's claim that the Circuit Court of Appeals did not consider the matter of equity jurisdiction is entirely unfounded.

It will be noted that the Court discusses this very proposition on pages 43, 44 and 45 of the printed record.

There is no basis for a claim that the Circuit Court of Appeals departed from the accepted and usual course of jurisdictional proceedings, or sanctioned such a departure by a lower court. There can be no claim that a question of Federal law was decided which should be settled by the Supreme Court, or that the Circuit Court of Appeals rendered a decision in conflict with applicable local decisions or with the decision of another Circuit Court of Appeals on the same subject. This application is, of course, an attempt to obtain another hearing on matters peculiar to this controversy, and to this controversy alone. Below petitioners contended that equity had no jurisdiction to enjoin the enforcement of a state act by the state law enforcement officers as unlawfully misconstrued by such officers. Petitioners claimed that equity was without jurisdiction unless the statute was attacked as unconstitutional. The Circuit Court of Ap-

peals passed on this question in conformity with the previous decisions of this Court and now no claim is made that its decision was or is erroneous.

PETITIONERS' SPECIFICATIONS OF ERROR OR REASONS FOR REVIEW

"The Circuit Court of Appeals erred—

"(1) in deciding an important question of general law in a way untenable and in conflict with the weight of authority;

"(2) that it has erred in deciding a federal question (i. e., equity jurisdiction of the federal District Court) in a way in conflict with applicable decisions of this Court; and

"(3) that it has erred in so departing from the accepted and usual course of judicial proceedings, and so sanctioned such departure by the District Court from which the appeal was taken, as to call for an exercise of this Court's power of supervision."

Petitioners discuss these three specifications of error. We will do likewise.

Petitioners assert that the Nebraska Full Train Crew Law is constitutional. Respondent did not allege or claim that the Act as passed was unconstitutional. Respondent alleged a misconstruction of the Act. Following a quotation from the opinion of the Circuit Court of Appeals, petitioners assert that the lower court erred in supposing that threatened property damage appeared from the allegations of the petition which were admitted in the

answer. Petitioners assert that the pleadings disclosed no threatened damage to property or threatened multiplicity of suits.

An examination of Paragraph VIII of defendant's answer (p. 25 P. R.) will show that it is admitted that if the respondent was required to discharge its colored brakemen and hire white brakemen, it would pay out in salaries an additional sum of $6,700.00 per year on two of its passenger trains. Paragran VIII of the answer likewise admits that the scale paid to the colored brakemen is according to the mutual agreement between the colored brakemen and the respondent. That is, it is admitted in the answer that the Company has a contract with the colored brakemen, and that, considering the movements of two trains alone, a violation of the contract would cost the respondent $6,700.00 a year. This is admitted in Paragraph VIII of petitioners' answer (p. 25 P. R.).

In Paragraph X of the answer filed by petitioners below (p. 26, P. R.), the defendants below admitted that the penalties provided by the statute involved, as applied to the respondent's operation of trains 109 and 110, making, within a year's time, 1,460 train movements, involve maximum possible gross fines of $1,460,000.00 per year. Defendants alleged that they have no intention of bringing any action for penalties "unless and until a test action has been brought and prosecuted to final determination, which shall fully determine plaintiff's liability in the premises."

On page 9 of petitioner's brief, certain paragraphs from defendant's answer appear. In this the Attorney General alleges as follows—

"nor will he seek by means of such test suit or action to inflict financial penalties or loss upon the the defendant prior to such time as it has been finally determined by orderly procedure in the courts of the state that the plaintiff is in fact committing acts which are violative of said statute."

That a relationship of employer and employee is a property right was held in the leading case of *Truax v. Raich*, 239 U. S. 32, 60 L. Ed. 131 (1915), in which the Supreme Court found that an alien employee was entitled to an injunction against the criminal prosecution of his employer under an unconstitutional law regulating the employment of aliens in Arizona. The Supreme Court there said:

"It is also settled that while a court of equity, generally speaking, has 'no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors' (Re Sawyer, 124 U. S. 200, 210, 31 L. ed. 402, 405, 8 Sup. Ct. Rep. 482), a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property. * * * The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law. It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time, for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn, is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of

authority, the unjustified interference of third persons is actionable although the employment is at will. * * *"

It is clear that the relationship would also be a property right in the employer.

It has been held that the enforcement of Full Crew Statutes involves property rights of the railroad. In the case of *Missouri Pacific R. Co. v. Norwood, Attorney General of Arkansas*, 42 F. (2d) 765 (D. C., Ark., 1930), before Stone, Circuit Judge, and Munger and Faris, District Judges, it was said in the *per curiam* opinion:

> "* * * Obviously, a property right of plaintiff is involved in the enforcement of these statutes. Where such is the case and where a multiplicity of such prosecutions are involved, a court of equity may intervene even though the effect is to enjoin the enforcement of criminal laws. Yu Cong Eng v. Trinidad, 271 U. S. 500, 507, 46 S. Ct. 619, 70 L. Ed. 1059; Truax v. Raich, 239 U. S. 33, 37, 36 S. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283."

While it is true that the petitioners had in their answer the allegations set forth on pages 13 and 14 of their brief, likewise it was admitted in the pleadings that the Nebraska State Railway Commission, one of the defendants below, while finding and holding that the colored "brakemen-porters," both from a safety standpoint and a service standpoint, were qualified to and were competently handling the job of brakeman, nevertheless, were of the opinion that so far as a literal interpretation of the statutes is concerned, trains Nos. 109 and 110 were not operated by employees bearing the titles set forth in Section 74-519 "which makes the defendant company liable for criminal prosecution under Section 74-522, C. S. of 1929" (pp. 6-7, Pr. Rec.).

All of the defendants, including the Attorney General, in the joint answer allege, in Paragraph VI, that plaintiff operated its trains with a crew consisting, in addition to the engine crew, of one man qualified to perform and performing the duties of conductor, one man qualified to perform and performing the duties of brakeman and porter, *"but deny that such operation fully meets all requirements and intendments of said statute"* (p. 22, Pr. Rec.).

Also, in Paragraph VI of the answer, the defendants deny that the statute makes no requirement as to how the plaintiff shall entitle its employees on the trains in question.

The answer admits that trains Nos. 109 and 110 make some 1,460 train movements in a year, and the answer admits that the maximum possible fine of $1,000.00 for each conviction would represent gross fines of $1,460,000.00 per year (Par. X, p. 26, Pr. Rec.).

It is apparent that it is the attitude of the appellants, notwithstanding all of their admissions, that the Missouri Pacific does not comply with the statute.

Appellant had been harassed with three hearings before the Railway Commission.

If the appellee is to employ colored men as brakemen, it cannot simply designate them "brakemen," even though, in fact, they only do porter work, when their brakemen's duties will permit. The reason is because the white union, the Brotherhood of Railway Trainmen, objects to colored trainmen, even though doing brakemen work 100%, being designated as "brakemen," thus receiving the same appellation as the white brakemen. The

paradoxical situation then obtains of this same union contending that, as the colored trainmen doing the brakemen's work are designated "brakemen-porters," because they in fact do some additional porter work, therefore the statutory requirement of "one brakeman" is not complied with. This is certainly blowing hot and cold. In fact, it is making a travesty of the laws involved, and is an obvious attempt to use the regulatory statutes of the state for confessedly selfish purposes, and without even the veneer of pretense that the public good is sought to be served.

It is apparent that the name "brakemen," as applied to a train service employee, is more or less of a misnomer. The operation of passenger trains by air-brake system is so efficient that the train service employee or brakeman is not subjected to the stopping of a train by the use of hand-brakes. The only time a train service employee would have occasion to use brakes would be where a car was set out on a siding to be left there unattended.

In an attempt to oust the colored man and to obtain these jobs, Mr. Moredick, the official of the white union, instituted the proceedings before the Nebraska State Railway Commission. That this was his intention was stated in evidence. This evidence is pleaded in the petition and admitted in the answer.

No question of the public safety is involved and no question of service is involved.

The respondent had been harassed with three hearings before the Commission, instituted by Mr. Moredick. It turned the matter over to the Attorney General's of-

fice. That defendant in his answer still insists that the Company fails to comply with the law, as set out above.

Having in mind that these trains are being operated daily, and that every time the train operates an offense is committed if, in truth and in fact, the appellee does violate the statute; having in mind the enormity of the penalties provided, and having in mind that the law enforcement officers are sworn to enforce the laws, the appellee had the right to come into a Court of Equity to enjoin the carrying out of the erroneous interpretation of the statute, especially where all of the facts are admitted and where it is simply a question of law as to whether or not the Company's admitted actions meet the requirements of the statute.

Judge Donohoe was of the opinion that there was no need for further evidence. He read the petition and the answer of the defendant and was of the opinion that on the facts admitted to be true in the appellant's answer, the appellee was entitled to equitable relief.

Appellee could have instituted a declaratory judgment suit under the 1934 Federal Act, asking the Court to declare whether it complied with the statute involved.

It is said in Vol. 16, Amer. Juris., Sec. 24, p. 296—

"Statutes, Ordinances, etc. — Declaratory judgment proceedings have frequently been employed to determine questions as to the construction or validity of statutes, ordinances, and other governmental regulations. The Uniform Act expressly enumerates these questions among those which may be determined thereunder, and other declaratory judgment acts contain similar provisions. Moreover, there is authority to the effect that declaratory judgments

upon these questions may be rendered even though the statute applicable does not so provide in express terms. Thus, the Federal Declaratory Judgments Act, although it does not mention declarations as to the construction or validity of statutes, has been invoked frequently as a means of assaying the constitutionality of congressional legislation."

In Mr. Borchard's book entitled "Declaratory Judgment," the author says on page 560:

"Constitutionality and validity being conceded, the construction and interpretation of statutes and ordinances and the question of their application to the plaintiff is a common quest of declaratory action. We shall not here attempt to discuss the many cases involving contracts, wills, bankruptcy, and almost every conceivable type of legal relation the determination of which turns indirectly upon the construction or interpretation of a statute. The present section will be confined solely to those cases in which the statute or ordinance is directly and immediately placed in issue, by demand for its construction or interpretation. The consequences and effects of that construction or interpretation—the secondary but real goal of the action—often depend upon the meaning of a single word or term in the statute and upon the application of the statute to the plaintiff or his business and the powers or duties of a public body, whether placed in issue by an interested private party or by the administration itself. The clarification of statutory rights, powers, privileges, and immunities is of growing importance in the solution of conflicts not only between the Government and the individual, in which relation the issue most frequently arises, but more and more under the control of statutory regulation. The issue is usually narrowed to a precise point, the solution of which determines the entire issue between the parties."

On page 15 of petitioner's brief petitioners call attention to the fact that there are some decisions to the effect that a law enforcement officer may not be enjoined from enforcing a valid State enactment, even though they are misconstruing the law. *This was the principal contention of the petitioners below.*

Judge Gardner, in his opinion, commencing on page 43 of the printed record, discusses this proposition, and after citing a number of cases quotes at length from the decision of this Court in *Philadelphia Co. v. Stimson*, 223 U. S. 605. This case clearly holds that equity has authority to restrain criminal prosecutions threatened by law enforcement officers of a state under a misconstruction of a State statute. To demand that the respondent discharge its colored brakemen and employ white brakemen in their stead, under the statute involved, amounts to an illegal demand. The Court in the cited case said—

> "And a similar injury may be inflicted and there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government against the individual owner, is gulity of an invasion of private property."

In the case at bar, the Attorney General and the other defendants, i. e., the law enforcement officers of the State of Nebraska are insisting that the respondent is violating the statute involved.

In the case of *Greene v. Louisville & I. R. Co.*, 244 U. S. 499, this Court held, in discussing the power of a court of equity to grant injunction to restrain an officer from enforcing a statuate—

"The principle is not confined to the maintenance of suits for restraining the enforcement of statutes which, as enacted by the state legislature, are in themselves unconstitutional."

The Circuit Court of Appeals came to the conclusion, as did the lower court, that the enforcement of the statute as construed by the petitioners, involved a property right of the respondent and would subject the respondent to a multiplicity of prosecutions, and would subject it to a maximum possible fine of $1,000.00 for each conviction and, as there were some 1,460 train movements in a single year made by the two trains involved, and as each train movement would be a separate offense, if operated with a crew in violation of the statute, the gross penalties for a year, on these two trains, might aggregate a million and a half dollars.

It is in the record that there were three hearings before the Railway Commission. It is in the record that the petitioners alleged in their answer that respondent did not comply with the Full Train Crew Law, and was operating its trains in violation thereof. Such being the position of the law enforcement officers, as set forth in their answer, respondent did not have to wait indefinitely.

In the case of *Missouri Pacific Railroad Co. v. Norwood, Attorney General of Arkansas, et al.*, 42 F. (2d) 765, there was involved a Full Crew Bill. In the cited case it was claimed that it was unconstitutional. The defendants filed a motion to dismiss, claiming it was a suit against a state. This contention was overruled, the Court citing numerous cases.

A second ground of the motion was that it was not allowable because the suit sought to enjoin the enforce-

ment of a criminal statute, in that the plaintiff had not availed itself of the full and complete remedy that it had under the laws of the State. The Court, in overruling the second ground, stated that obviously a property right of the plaintiff was involved, and that where such is the case, and where a multiplicity of prosecutions are involved, a court of equity may intervene even though the effect is to enjoin the enforcement of criminal laws.

A third ground was based on the claim that no appeal had been taken from prosecutions which had gone to judgment and that the plainitff should have availed itself of an appeal from the Justice of the Peace to the State Circuit Court, thence to the State Supreme Court, etc. The Court said—

> "If the violations covered by such judgments were all that were involved in this proceeding, there would be much force in the above suggestion. But where the statutes provide (as here) that 'each freight train' so run and each switching 'crew' so operated shall be a separate offense, and where the purpose of the bill is to prevent all prosecutions in the future, the inadequacy of the above procedure is evident. While the tedious journey of appeal through three consecutive courts is being traveled, the plaintiff is compelled to submit to the statutes and undergo losses it can never recover."

We are of the opinion that the law involved is properly set forth in the following rules of law, as deduced from the supporting authorities cited:

I.

Notwithstanding the constitutionality of a statute, one affected is entitled to injunctive relief against criminal prosecutions threatened by the law enforcement officers of a state because of their wrongful misconstruction of the statute involved (Full Crew Statute).

A valid law may be wrongfully interpreted and administered by the officers of a state so as to make such administration an illegal exaction upon the individual, entitling him to equitable relief.

Likewise, such equitable action is not a suit against the state as an erroneous administration of a valid statute to the injury of the individual is an act without legal sanction, and is not protected by the official status of those sought to be enjoined.

Greene v. Louisville & I. R. Co., 244 U. S. 499.

Philadelphia Company v. Stimson, 223 U. S. 605, 56 L. Ed. 570.

Smith v. Tillitson, 29 F. (2d) 535 (C. C. A. 8, 1928).

Davies, Sheriff, et al., v. Mills Novelty Co., 70 F. (2d) 424 (C. C. A. 8, 1934).

Royal Baking Powder Co. v. Emerson, 270 F. 431 (C. C. A. 8, 1920).

Weyman-Bruton Co. v. Ladd, 231 F. 898 (C. C. A. 8, 1916).

Boynton, Attorney General of Kansas, et al., v. Ellis, 57 F. (2d) 665 (C. C. A. 10, 1932).

Chambers v. Bachtel, 55 F. (2d) 851 (C. C. A. 5, 1932).

Morgan v. Nolan, 3 F. Supp. 143 (D. C. S. D., Ind., 1933).

Dearborn Publishing Co. v. Fitzgerald, 271 F. 479 (D. C. N. D., Ohio, 1921).

Mahoney, et al., v. Carolene Products Co., 2 F. (2d) 366 (C. C. A. 1, 1924).

Stuart, et al., v. Utility Investing Corporation, 78 F. (2d) 279 (C. C. A. 3, 1935).

II.

Such equitable jurisdiction to restrain criminal prosecutions under such circumstances exists when the prevention of such prosecutions is essential to the safeguarding of rights of property, and appellee, in the case at bar, has property right in its employment contract with trainmen designated "brakemen and porters."

Truax v. Raich, 239 U. S. 32.

Missuri Pacific Railroad Corporation v. Norwood, Attorney General of Arkansas, 42 F. (2d) 765.

American Steel & Wire Co. v. Davis, 261 F. 800.

III.

Likewise, where a multiplicity of prosecutions under erroneous construciton of regulatory statute are involved, a court of equity may intervene, even though the effect is to enjoin the enforcement of criminal laws.

Missouri Pacific Railroad Company v. Norwood, Attorney General of Arkansas, 42 F. (2d) 765.

Yu Cong Eng v. Trinidad, 271 U. S. 500, 507.

Truax v. Raich, 239 U. S. 33, 37.

IV.

Likewise, equitable relief may be granted to restrain prosecutions under erroneous construction of statute by enforcement officers where threatened action involves a multiplicity of separate offenses and where threatened action would deprive the individual of its property with-

out due process of law and will deny the individual the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Sterling v. Constantin, 287 U. S. 378, 77 L. Ed. 375.
Iowa & Des Moines Natl. Bank v. Bennett, 284 U. S. 239.

V.

Likewise, where, as in the case at bar, the statute involved was one providing the complement of train crews on passenger trains operated by railroad in Nebraska, and where it is admitted that under interpretation of enforcement officers, as there would be some 1,460 train movements in a single year and as the maximum possible fine is one thousand dollars for each conviction, and as each train movement would be a separate offense, if operated with a crew in violation of the statute, gross penalties for a single year on two trains, might aggregate $1,460,000.00, the Railroad Company involved is entitled to invoke the equitable jurisdiction of the Federal Court to restrain enforcement of the statute as interpreted and construed by the enforcement officers.

Panama v. Ryan, 293 U. S. 388.
Royal Baking Powder Co. v. Emerson, 270 F. 431 (C. C. A. 8).
National Remedy Co. v. Hyde, 50 F. (2d) 1066.

In *Sterling vs. Constantin*, 287 U. S. 378, 77 L. Ed. 375, in which this Court found that an alien employee was entitled to an injunction against the Governor of Texas, enjoining him from regulating the production of oil under a declaration of martial law, the Court said:

"* * * The District Court had jurisdiction. The suit is not against the State. The applicable principle is that where state officials, purporting to act under

state authority, invade rights secured by the Federal Constitution, they are subject to the process of the Federal courts in order that the persons injured may have appropriate relief. Ex parte Young, 209 U. S. 123, 155, 156, 52 L. ed. 714, 13 L. R. A. (N. S.) 932, 28 S. Ct. 441, 14 Ann. Cas. 764; Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 292, 293, 57 L. ed. 510, 516, 517, 33 S. Ct. 312; Truax v. Raich, 239 U. S. 33, 37, 38, 60 L. ed. 131, 133, 134, L. R. A. 1916D, 545, 36 S. Ct. 7, Ann. Cas. 1917B, 283; Cavanaugh v. Looney, 248 U. S. 453, 456, 64 L. ed. 354, 357, 39 S. Ct. 142; Terrace v. Thompson, 263 U. S. 197, 214, 68 L. ed. 255, 274, 44 S. Ct. 15. The Governor of the State, in this respect, is in no different position from that of other state officials. See Davis v. Gray, 16 Wall. 203, 210, 233, 21 L. ed. 447, 452, 457; Continental Baking Co. v. Woodring, 286 U. S. 352, 76 L. ed. 1155, 81 A. L. R. 1402, 52 S. Ct. 595; Binford v. McLeaish, 284 U. S. 598, 76 L. ed. 513, 52 S. Ct. 207; (D. C.) 52 F. (2d) 151, 152; Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581. Nor does the fact that it may appear that the state officer in such a case, while acting under color of state law, has exceeded the authority conferred by the State, deprive the court of jurisdiction. Iowa-Des Moines Nat. Bank v. Bennett, 284 U. S. 239, 246, 76 L. ed. 265, 272, 52 S. Ct. 133; Fidelity & D. Co. v. Tafoya, 270 U. S. 426, 434, 70 L. ed. 664, 666, 46 S. Ct. 331."

In the case of *Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 239, 76 L. Ed. 265, Mr. Justice Brandeis, in the opinion of the Court, said:

"The prohibition of the 14th Amendment, it is true, has reference exclusively to action by the State, as distinguished from action by private individuals. Virginia v. Rives, 100 U. S. 313, 318, 25 L. Ed. 667, 669, 3 Am. Crim. Rep. 524; United States v. Harris, 106 U. S. 629, 639, 27 L. ed. 290, 294, 1 S. Ct. 601.

> But acts done 'by virtue of a public position under a State Government * * * and in the name and for the State,' Ex parte Virginia, 100 U. S. 339, 347, 25 L. ed. 676, 679, 3 Am. Crim. Rep. 547, are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to an express command of the state law. When a state official, acting under color of state authority, invades, in the course of his duties, a private right secured by the federal Constitution, that right is violated, even if the state officer not only exceeded his authority but disregarded special commands of the state law. * * *"

and in the footnote—

> "Cases discussing the question of what constitutes a suit against the State within the meaning of the 11th Amendment, such as Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L. R. A. (N. S.) 932, 28 S. Ct. 441, 14 Ann. Cas. 764; Western U. Teleg. Co. vs. Andrews, 216 U. S. 165, 54 L. ed. 430, 30 S. Ct. 286; Looney v. Crane Co., 245 U. S. 178, 62 L. ed. 230, 38 S. Ct. 85; Public Serv. Co. v. Corboy, 250 U. S. 153, 63 L. ed. 905, 39 S. Ct. 440, have no bearing upon the power of this Court to protect rights secured by the federal Constitution."

It is apparent from the facts alleged in the petition filed below and admitted in the answer; that the respondent was and is complying, in every respect, with the Nebraska Full Crew Bill as properly interpreted, and that the construction placed on the law by the petitioners herein is entirely unwarranted. The petitioners herein were the enforcement officers of the State, and if respondent is violating the statute, would be obligated to enforce the penalties provided in the statute (Sections 84-204 and 26-901 to 911, Comp. Statutes of Nebr., 1929). Thousands of train movements are involved. Possible

maximum fines of over $1,000,000.00 confronted respondent. Respondent had been subjected to three hearings before the State regulatory body of the Nebraska State Railway Commissioner. Petitioners still insisted in their answer that respondent was violating the statute. Under such circumstances where there was no dispute as to what the facts were, where the dispute was as to the interpretation of the statute and the meaning of the statute, and where the dispute between the parties was whether or not the crew furnished the trains in question was in compliance with the statute, and where no State decision has been had, Federal Courts in Equity had jurisdiction to restrain the enforcement of the statute as interpreted by the officers, to protect the property rights and the right of contract of the respondent and to avoid a multiplicity of suits.

To refuse to do this would be, in our opinion, to take a step backward; would be to overlook the modern tendency to simplify court procedure, which seeks the decision of law propositions in dispute, without subjecting the parties involved to a contest involving procedure usually provided for the prosecution of criminals.

CONCLUSION

We submit that the petitioners' application should be dismissed; that it lacks any substantial grounds for the granting of a writ of certiorari. It is an attempt to obtain another hearing on matters peculiar to this controversy, and to this controversy alone.

We therefore respectfully request that petitioners' petition for a writ of certiorari be denied.

Respectfully submitted,

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May 31, 1940.

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SUPREME COURT OF THE UNITED STATES.

No. 72.—October Term, 1940.

Henry J. Beal, County Attorney of Douglas County, Nebraska, et al., Petitioners,
vs.
Missouri Pacific Railroad Corporation in Nebraska.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[January 20, 1941.]

Mr. Justice Stone delivered the opinion of the Court.

The question is whether respondent, plaintiff in the district court below, has established a cause of action in equity entitling it to a decree enjoining petitioners, the Attorney General of Nebraska and other state officers from prosecuting respondent's agents and officers in the state courts for criminal violations of the Nebraska Full Train Crew Law, § 74-519 Comp. Stat. of Nebraska, 1929.

The statute makes it unlawful for any railroad in Nebraska to operate any passenger train of more than five cars "with a crew consisting of less than one engineer, one fireman, one conductor, one brakeman and one flagman". Passenger trains of five cars or less are required to be operated with a like crew, except that only "one brakeman or flagman" is required instead of the one brakeman and one flagman required in the case of trains of more than five cars. By § 74-522, officers or agents of railroads dispatching trains in violation of the statute are guilty of a misdemeanor punishable by fine of not less than $100 nor more than $1,000 for each offense and the railroad is made liable for any damage caused by violations.

Respondent's bill of complaint invoked the jurisdiction of the district court on grounds of diversity of citizenship. The facts alleged, so far as now material, are as follows. Respondent operates two trains in Nebraska, on which it assigns for the performance of the duties of a brakeman or flagman required by the statute, colored employees who are fully qualified to perform and do perform those

duties, but who are designated as "brakemen-porters" and paid lower wages than are respondent's white "brakemen".

On complaint lodged with the State Railway Commission by an officer of the Brotherhood of Railroad Trainmen it was alleged that respondent violated the statute, by employing brakemen-porters to perform the services of brakemen or flagmen. The Commission twice dismissed the complaint, but upon rehearing it ruled that although respondent's brakemen-porters, in addition to the duties of brakemen, when performance of such duties permit, render some services as porters, they competently perform the duties to which they are assigned, namely those of brakemen or flagmen, and that respondent's trains, so far as the public safety is concerned, are adequately manned. The Commission declined to pass upon the question whether their employment in the manner alleged complied with the Full Train Crew Law of the state and ordered that the records in the case be made available to the state attorney general for his use, if so advised, in prosecuting respondent for violation of any criminal statute of the state.

The bill of complaint also alleges that employment of white brakemen for the services now performed by respondent's brakemen-porters will compel it to pay an increase of wages in excess of the jurisdictional amount, and that as each train movement involves an alleged violation of the statute, numerous prosecutions for violations, which petitioners threaten, will result in imposing on respondent the burden of many litigations in the state criminal courts. Such prosecutions, if successful, it is alleged, will result in the imposition of aggregate fines in excess of $1,000,000 a year. The relief prayed is that the threatened prosecutions be declared to be unauthorized by the statute, and that petitioners be enjoined from interfering with the operation of respondent's trains through criminal prosecution or otherwise.

After denial by the district court of petitioners' motion to dismiss the bill of complaint for want of equity, petitioners answered denying among others the allegations that respondent is threatened with multiplicity of criminal suits or that petitioners intended to proceed with prosecutions for violation of the statute, except as specifically stated in the answer. The answer sets up affirmatively that the attorney general has under consideration the question of respondent's compliance with the statute, and in the event that he

should determine that it is "necessary and proper to do so" in order to obtain a judicial determination of the question, he would cause a single test suit to be instituted in the state courts for some one alleged violation of the act by respondent, so conducted as to cause a minimum of financial expense to respondent and without seeking to inflict financial penalties or loss on respondent prior to a final determination of the suit in the state courts.

The district court, without trial of any issue of fact, gave its decree for respondent, on the pleadings, for an injunction as prayed. The Court of Appeals for the Eighth Circuit affirmed. 108 F. (2d) 897. We granted certiorari, October 14, 1940, on a petition which challenged the equity jurisdiction of the district court to enjoin, in the circumstances, a criminal proceeding in the state courts, the question being of public importance since it involves the appropriate relationship of the federal to the state courts.

The court of appeals, construing the statute, held that the crews on respondent's trains conform to the statutory requirements; that criminal prosecution of respondent's officers is unauthorized by the Act and unlawful. It supported the exercise of the equity powers of the court to restrain the prosecutions on the ground that the attempted enforcement of the statute as construed by petitioners would subject respondent to a multiplicity of such prosecutions and to the risk, if petitioners' construction of the statute should be sustained, that fines or penalties aggregating a large amount would be imposed.

It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. *In re Sawyer*, 124 U. S. 200, 211; *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 500. No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts. The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid. *Terrace* v. *Thompson*, 263 U. S. 197, 214; *Packard* v. *Banton*, 264 U. S. 140, 143; *Tyson* v. *Banton*, 273 U. S. 418, 428; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 452.

This is especially the case where the only threatened action is the prosecution in the state courts by state officers of an alleged viola-

tion of state law, with the resulting final and authoritative determination of the disputed question whether the act complained of is lawful or unlawful. *Harkrader* v. *Wadley*, 172 U. S. 148; *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 95. The federal courts are without jurisdiction to try alleged criminal violations of state statutes. The state courts are the final arbiters of their meaning and appropriate application, subject only to review by this Court if such construction or application is appropriately challenged on constitutional grounds. *Hygrade Provision Co.* v. *Sherman, supra; Fenner* v. *Boykin*, 271 U. S. 240.

Hence interference with the processes of the criminal law in state courts, in whose control they are lodged by the Constitution, and the determination of questions of criminal liability under state law by federal courts of equity can be justified only in most exceptional circumstances, and upon clear showing that an injunction is necessary in order to prevent irreparable injury. Cf. *Hygrade Provision Co.* v. *Sherman, supra; Cline* v. *Frink Dairy Co., supra; Spielman Motor Co.* v. *Dodge, supra.* And in the exercise of the sound discretion, which guides the determination of courts of equity, scrupulous regard must be had for the rightful independence of state governments and a remedy infringing that independence which might otherwise be given should be withheld if sought on slight or inconsequential grounds. *Di Giovanni* v. *Camden Insurance Association*, 296 U. S. 64, 73, and cases cited.

Here the court below found danger of irreparable injury in the threatened multiplicity of prosecutions and risk that the aggregate fines which might be imposed would be very large. But whether more than one criminal prosecution is threatened was by the pleadings made an issue of fact which the district court did not resolve. If it had found after a hearing, as the answer alleges, that only a single suit is contemplated, we could not say that any such irreparable injury is threatened as would justify staying the prosecution and withdrawing the determination of the legal question from the state courts, whose appointed function is to decide it. *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276, 287; *Spielman Motor Co.* v. *Dodge, supra*, 96.

If its decision should be favorable to respondent no reason is shown for anticipating further prosecutions. If it were adverse, penalties in large amount, it is true, might be incurred, but they

may well be the consequence of violations of state law. No question is here presented of the constitutional validity of the statute because the penalties which it inflicts are so great as to prevent recourse to the courts for the adjudication of respondent's rights under it. See *Ex parte Young*, 209 U. S. 123, 144; *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340, 349.

It does not appear that any motion was made by the parties for judgment on the pleadings. But the record shows that the trial court entered the decree in respondent's favor on its own motion. Upon such a motion denials and allegations of the answer which are well pleaded must be taken as true. So taken the decree for respondent cannot be sustained and must be reversed. The majority of the Court are of opinion[1] that in view of the state of the record and certain concessions made by counsel on the argument here any further hearing of the issue of irreparable injury to respondent from a threatened multiplicity of suits has been waived. The reversal will accordingly be with instructions to the district court to dismiss the bill of complaint.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[1] The CHIEF Justice, Mr. Justice MCREYNOLDS and Mr. Justice STONE are of opinion that the case should be remanded to the district court for further proceedings.